United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

CONSOLIDATED JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17,991
17,992
17,993

887

EDDIE M. HARRISON,

ORSON G. WHITE,

and

JOSEPH R. SAMPSON,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

CONSOLIDATED JOINT APPENDIX

[Filed April 19, 1960]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on February 25, 1960, Sworn in on March 1, 1960

The United States of America	:	Criminal No. 365-60
	:	
v.	:	Grand Jury No. 427-60
	:	
	:	Violation: 22 D.C.C. 2401
Eddie M. Harrison	:	(Murder in the First Degree)
Orson G. White	:	22 D.C.C. 2401
	:	(Murder in the First Degree -
Joseph R. Sampson	:	Killing while perpetrating the
	:	crime of robbery)

The Grand Jury charges:

On or about March 8, 1960, within the District of Columbia, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, purposely and with deliberate and premeditated malice, murdered George H. Brown by means of shooting him with a shotgun.

SECOND COUNT:

On or about March 8, 1960, within the District of Columbia, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, unlawfully and feloniously did murder George H. Brown by means of shooting him with a shotgun, while attempting to perpetrate the crime of robbery.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ William E. W. Howe
Foreman.

[Filed April 22, 1960]

PLEA OF DEFENDANT
[HARRISON]

On this 22nd day of April, 1960, the defendant Eddie M. Harrison, appearing in proper person and by his attorney Perry W. Howard, being arraigned in op en Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of

RICHMOND B. KEECH
Presiding Judge
Criminal Court #1

[Filed April 29, 1960]

PLEA OF DEFENDANT
[WHITE]

On this 29th day of April, 1960, the defendant Orson G. White, appearing in proper person and by his attorney William S. Thompson and Samuel F. Ianni, being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is granted 10 days to file appropriate motions. Attorney William S. Thompson permitted to withdraw from case; new counsel to be appointed.

The defendant is remanded to the District Jail.

By direction of

CHARLES F. McLAUGHLIN
Presiding Judge
Criminal Court #3

[Filed April 29, 1960]

PLEA OF DEFENDANT
[SAMPSON]

On this 29th day of April, 1960, the defendant Joseph R. Sampson, appearing in proper person and by his attorney L. A. Harris, being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is granted 10 days to file appropriate motions.

The defendant is remanded to the District Jail.

By direction of

CHARLES F. McLAUGHLIN
Presiding Judge
Criminal Court #3

[Filed June 30, 1961]

MOTION OF THE GOVERNMENT FOR THE APPOINTMENT OF COUNSEL [Harrison, White, Sampson]

Comes now the United States by its Attorney, the United States Attorney in and for the District of Columbia, and moves the Court for the appointment of counsel to represent the defendants, Eddie M. Harrison, Orson G. White, and Joseph R. Sampson, in this proceeding and in support hereof represents to the Court as follows:

1. The defendants, Eddie M. Harrison, Orson G. White, and Joseph R. Sampson, were indicted on April 19, 1960, in a two count indictment charging Statutory Murder in the First Degree, and Felony Connected Murder, which is also Murder in the First Degree. The defendants went to trial with the result that the jury returned a verdict of guilty on Count 2 (Felony Connected Murder) on October 19, 1960. On April 21, 1961, the defendants were sentenced to death by electrocution. The execution of the sentence has been stayed pending appeal. During the trial proceeding the defendant Eddie M. Harrison was represented by the late Perry W. Howard, Esq., and the defendants, Orson G. White and Joseph R.

Sampson were represented by counsel of their own choosing, that is, a person named Morgan who employed the name "L. A. Harris". After the verdict, but prior to sentencing, the late Perry W. Howard, Esq., died and Morgan, also known as "L. A. Harris" was appointed by the Court to represent Eddie M. Harrison at the time of sentencing. The result was that all three defendants were represented by Morgan, alias "L. A. Harris" on April 21, 1961, at the time of sentencing. However, no discretion was exercised at the time of sentencing because the sentence of death by electrocution was mandatory under the governing statute.

2. The Government respectfully moves the Court to appoint counsel to represent the defendants White and Sampson in the review of the trial record to determine if such defendants enjoyed their Constitutional right to the effective assistance of counsel during and prior to trial and judgment in this cause. The Government suggests that counsel so appointed be permitted to a reasonable time within which to make such motions as may be dictated by the state of the record in this cause. This motion does not include defendant Harrison because he was represented by Morgan, alias "Harris" only at time of sentencing which was mandatory and non-discretionary.

Respectfully submitted,

/s/ David C. Acheson
United States Attorney

/s/ Edward P. Troxell
Principal Assistant United States Attorney

/s/ John C. Conliff
Assistant United States Attorney

/s/ Frederick G. Smithson
Assistant United States Attorney

/s/ Oscar Altshuler
Assistant United States Attorney

[Certificate of Service]

[Filed September 12, 1961]

SUPPLEMENTAL STATEMENT OF FACTS RELATIVE TO MOTION TO VACATE AND SET ASIDE JUDGMENT AND GRANT A NEW TRIAL [Harrison]

Comes now the United States of America by its attorney, David C. Acheson, United States Attorney in and for the District of Columbia, and further represents to this Court the following facts with regard to the motion to vacate and set aside judgment and grant a new trial filed on behalf of the above-named defendant.

1. In the previous statement of facts relative to said motion filed on behalf of the government on August 4, 1961, it was stated in error in paragraph six of that statement, that the defendant Eddie M. Harrison's trial counsel was not in fact qualified to act as such, and in paragraph seven thereof, it was suggested that should the defendant desire that this Court vacate and set aside the verdict, judgment and sentence entered herein, it would be the government's position to interpose no objection to the grant of such motion. This, the government submits, is in error.

2. It is noted that the defendant Eddie M. Harrison was represented by the late Perry W. Howard, a member of the bar of this Court for many years and a highly competent and qualified trial attorney. The defendant was represented by Mr. Howard in all preliminary proceedings and throughout the lengthy trial of the charges contained in this indictment, through the verdict of the jury and in fact Mr. Howard filed on behalf of the defendant a motion for new trial and arrest of judgment and memorandum in support thereof.

Subsequent to the filing of this motion and before oral argument was held thereon, Mr. Howard died (February 1, 1961). This motion was thereupon heard by this Court on February 3, 1961, at which time the defendant Eddie M. Harrison was represented by appointment of this Court by one Daniel Jackson Oliver Wendel Holmes Morgan, a/k/a L. A. Harris, at that time counsel for the codefendants, Orson G. White and Joseph R. Sampson.

Accordingly, it is respectfully suggested to the Court that the defendant Eddie M. Harrison was represented by competent and qualified counsel during the entire course of these criminal proceedings except for the oral argument with regard to a motion for new trial and that as a consequence there is no factual or legal basis upon which to grant a motion to vacate and set aside the judgment and conviction and to grant a new trial to said Eddie M. Harrison merely because his two codefendants, Orson G. White and Joseph R. Sampson, were in fact represented by one not qualified and entitled to act as an attorney at law. There can be no question that this Court legally had jurisdiction over the offenses as well as the defendant in all proceedings held under this indictment up to the point where oral argument was to be held upon the motion to vacate and set aside judgment and conviction and to grant a new trial in his behalf. The only question remaining unanswered in this regard is whether the Court properly had jurisdiction over the defendant to proceed with oral argument on the motion filed by Mr. Howard following his death when the defendant was not represented by one qualified and entitled to act as an attorney at law. It is suggested that this Court should set aside the judgment of conviction and sentence of the defendant and set this case down for oral argument on the motion previously filed by his former counsel, Mr. Howard, at which time there can be no question but that this Court would have proper jurisdiction over the defendant to proceed to consider such motion and such actions as this Court deems appropriate with regard to the verdict of the jury and the matters contained within said motion.

Should it be the determination of the Court that the terms of the limited mandate of remand from the United States Court of Appeals for the District of Columbia, filed in this cause of action on July 22, 1961, does not empower this Court to set aside merely the sentence heretofore imposed and to set the motion for new trial and arrest of judgment heretofore filed by Mr. Howard down for oral argument and appoint new counsel to represent the defendant Eddie M. Harris for that purpose, it is further respectfully suggested that this matter be held in abeyance until effort

may be made by the United States Attorney for the District of Columbia seeking amplification of the order of remand for the purpose outlined herein.

/s/ David C. Acheson
United States Attorney

/s/ Frederick G. Smithson
Assistant United States Attorney

[Certificate of Service]

[Filed September 19, 1961]

STATEMENT OF THE POSITION OF THE UNITED STATES ATTORNEY WITH REGARD TO STATUS OF MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE AND TO GRANT NEW TRIAL [Harrison, White, Sampson]

Comes now the United States by its attorney, David C. Acheson, United States Attorney in and for the District of Columbia, and respectfully represents to this Court the following facts and recommendations with regard to the motion to vacate judgment of conviction and sentence and to grant new trial filed on behalf of each of the above-named defendants by their court appointed counsel.

Each of the above-named defendants was indicted on April 19, 1960, in a two count indictment, charging murder in the first degree, 22 D.C. Code 2401. The defendant Harrison was represented by Mr. Perry W. Howard through the entire trial except for argument on the motion for new trial and sentence. At this posture he was represented by one Daniel Jackson Oliver Wendel Holmes Morgan, also known as L. A. Harris, who it was later discovered was not the person Lawrence Archie Harris, a duly qualified and admitted member of the Bar of the District of Columbia, but in fact was an imposter, who fraudulently used this name. The defendants were convicted and all three were sentenced on April 21, 1961, to death by electrocution. An appeal was taken from this judgment and sentence. While these appeals were pending, information was brought to the

attention of the United States Attorney's office regarding the imposter Daniel Jackson Oliver Wendel Holmes Morgan. This information was in turn conveyed by means of suitable motions to the United States Court of Appeals for the District of Columbia Circuit, which in turn remanded this case by an order, the pertinent provisions of which are as follows:

> ORDERED by the court that the motion be granted and this case is hereby remanded to the District Court with leave to entertain a motion by the defendant to vacate and set aside judgment and to award a new trial, provided that such a motion is filed on or before July 31, 1961, and it is
>
> FURTHER ORDERED by the Court that in the event the District Court does not entertain such a motion to vacate and set aside judgment and to award defendant a new trial or, after entertaining and hearing such a motion, denies the same, the defendant, if he be so advised, may take an appeal therefrom, in which event the present appeal shall be reinstated and consolidated for hearing with the new appeal, and it is
>
> FURTHER ORDERED by the court that a certified copy of this order shall issue forthwith to the District Court. [Emphasis supplied.]

On September 14, 1961, these motions came before this Court to determine if the defendants enjoyed their constitutional right to the effective assistance of counsel prior to and during trial and judgment and sentence in this case.

Each of the three defendants through his counsel advised the Court that it was the individual desire of each defendant not to seek or request a motion to vacate and set aside judgment and to award a new trial.

The government affirmatively states that the present posture of this case requires that this Court treat the motions heretofore filed on behalf of each defendant by his newly appointed counsel without consultation with said defendant as withdrawn for by the terms of the order leave was granted to the defendants to so move, which they frankly and unequivocally refused to do. It cannot be stressed too strongly that the

action of each individual defendant attempts to force the Court to grant a motion to vacate and set aside judgment and to award a new trial without the consent of the defendant so that at an appropriate time during the course of a second trial the defense of double jeopardy could be raised in bar of the prosecution of these defendants for first degree murder. The claim of double jeopardy at such second trial would be that the factual record of the first trial was subject to alleged infirmities of proof which they might desire to assert on review and that by this grant of a new trial without their consent the Court was depriving them of their right of review and subjecting them, unwillingly, to a second trial for the same offense.

It is asserted that the Court should not allow this stratagem or ruse to prevail as it would enable these three defendants, who, by a verdict of one jury, were found guilty of the brutal slaying of George Brown during the course of an armed robbery, to escape punishment for their acts.

The oral representations made during the course of the hearing by present appointed defense counsel may very well give rise to a defense of double jeopardy to the crime charged in the instant indictment should this Court grant a motion to vacate judgment and award new trial without request expressed therefore. It is submitted that the state of the record of the previous trial fully sets forth the two defenses raised by both Mr. Howard, the attorney, and the imposter, L. A. Harris, which were that the defendants did not go there to rob the decedent, Mr. Brown, but to pawn a sawed-off shotgun with him and that the confessions which were received in evidence were not freely and voluntarily made but were the result of various beatings administered to them by the Metropolitan Police Department.

Counsel during argument referred to Section 3005 of Title 18, U.S.C., which provides that in any capital case an accused shall be allowed to make his full defense by counsel learned in the law and upon his, the accused's, request the Court shall assign to him such counsel. From the very wording of this provision it is clear that there is no

mandatory requirement that the Court appoint counsel, even in a capital case, should it be the desire of the defendant not to have such. In fact, the United States Court of Appeals for the District of Columbia Circuit in the case of William Brown, Jr., v. United States, 105 U.S. App. D.C. 77, stated that while there is a constitutional right to assistance of counsel, there is a "correlative right to dispense with a lawyer's help . . . . Adams v. United States, 317 U.S. 269, 279 (1942)." Surely if one may dispense with one's counsel entirely, he may choose to disregard actions previously taken in his behalf without his consent.

It appears to the prosecution that the decision in the case of Scott, et al. v. United States, 91 App. D.C. 232, 202 F.2d 354, contains appropriate precautionary advice which this Court should consider in this regard. In the Scott, et al case, four defendants were charged with a criminal violation, and after the jury in that case was impaneled, counsel for three of the defendants obtained admission of an associate counsel pro hac vice to render passive assistance to counsel in the defense of the three defendants. When the court convened the following day, the trial court announced, out of the hearing of the jury, that he had erred in admitting this associate. After lengthy discussion with counsel for the three defendants, the trial court permitted the associate to withdraw from the case and indicated a willingness to declare a mistrial. Counsel, however, declined to request one and thereafter the Court elicited from counsel for the three defendants the statement that his clients "would be put to disadvantage" and that the withdrawal of assisting counsel was "definite to reflect a certain amount of prejudice." The Court concluded therefrom that a declaration of mistrial was essential in the interests of justice and ordered a mistrial sua sponte.

The Court of Appeals in this decision, holding that the trial judge had not abused his discretion, made reference to the Perez case (9 Whest. 579, 22 U.S. 579, L.Ed 165):

> " * * * the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration,

> there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; * * *" [Emphasis supplied.]

Recognized in the admonition of the Supreme Court in Perez, supra, was the fact that the power to grant a new trial ought to be used with the greatest caution. Obviously, should this power be abused, a defendant or defendants might unnecessarily be placed in jeopardy for the same offense two or more times contrary to his constitutional rights. This, it is submitted, would be the case were the Court now to consider the motion filed on behalf of each defendant and grant any relief thereunder. It is urged with great sincerity that this Court recognize the wishes of each defendant which amount to a withdrawal of such plea and so consider and treat the motions heretofore filed on behalf of each defendant and not specifically withdrawn by their counsel as withdrawn at the request of the individual defendant and order an entry in the docket that such motions are withdrawn.

For these and for such other reasons as may be urged at a subsequent hearing upon this motion, it is respectfully submitted that this Court no longer has jurisdiction to entertain a motion to vacate judgment and set aside sentence.

/s/ David C. Acheson
United States Attorney

/s/ Frederick G. Smithson
Assistant United States Attorney

[Certificate of Service]

[Filed October 4, 1961]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER [Harrison, White, Sampson]

This matter came on for hearing before me on September 14, 1961, on orders from the United States Court of Appeals of the District of Columbia Circuit as to each of the three defendants, said orders dated July 21, 1961, with direction by the United States Court of Appeals to entertain a motion by each defendant to vacate and set aside judgment and award a new trial provided that such motion is filed on or before July 31, 1961. Pursuant to such orders, this hearing was duly held and the following constitutes the findings of fact, conclusions of law and order of this Court.

Statement of Facts

1. The defendants, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, were indicted on April 19, 1960, in a two-count indictment, charging murder in the first degree, a violation of Title 22, D.C. Code, Section 2401.

2. The defendant Eddie M. Harrison was represented by Mr. Perry W. Howard, a member of the bar of this Court and since deceased. The defendants Orson G. White and Joseph R. Sampson were represented by a person who indicated he was "L. A. Harris" and who entered his appearance on behalf of the defendant Sampson on April 29, 1960, and on behalf of defendant White on September 14, 1960. This indictment came on for trial on September 26, 1960, resulting in a verdict of guilty on Count Two of the indictment on October 19, 1960, before this Court.

3. The defendant Eddie M. Harrison was represented throughout all preliminary proceedings, the course of the trial and the verdict of the jury by Mr. Howard. A motion entitled "Motion for New Trial and Arrest of Judgment" was filed on behalf of all defendants by the person represented to be L.A. Harris and by Perry W. Howard. However, Mr. Howard died on February 1, 1961, prior to argument. Subsequently, at the request of the defendant Eddie M. Harrison, the person of the supposed L. A. Harris was appointed by this Court to represent the defendant

Harrison and to argue the motion for new trial and arrest of judgment on his behalf as well as that of the defendants White and Sampson. This motion was heard and subsequently denied on March 27, 1961.

4. Each of the defendants was sentenced on April 21, 1961, to death by electrocution. The defendants' applications to proceed on appeal without prepayment of costs was granted on April 21, 1961. While these appeals were pending, information was brought to the attention of the United States Attorney's office for the District of Columbia that the purported attorney for the defendants, utilizing the name of L. A. Harris, was not the person of Lawrence Archie Harris, a duly qualified and admitted member of the Bar of the District of Columbia, but in fact was an impostor, who fraudulently used the name of "L. A. Harris" and falsely represented himself to be the real Lawrence Archie Harris.

5. As reflected in several orders in this case from the United States Court of Appeals, supra, these facts were brought to the attention of the Court of Appeals in the instance of each defendant and resulted in the aforementioned orders.

6. The defendant Harrison is now represented in this Court by Jacob N. Halper, Esq.; the defendant White by Ross O'Donoghue, Esq.; the defendant Sampson by Daniel M. Singer, Esq., pursuant to appointment by former Chief Judge Pine on July 31, 1961.

It is noted that by the aforesaid orders of the Court of Appeals, supra, and pursuant to Rule 39a of the Federal Rules of Criminal Procedure, this Court has jurisdiction to consider, at the direction from the Court of Appeals, a motion by each defendant to vacate and set aside judgment and to award a new trial provided such a motion was filed on or before July 31, 1961. Pursuant to this order, each counsel for the three defendants filed an appropriate motion. The United States Attorney for the District of Columbia, in response to said motions to set aside judgment and to award a new trial, filed a statement of facts relative to said motions as to each defendant on or about August 4, 1961, wherein the government indicated to the Court that should the defendants White and Sampson affirmatively request, in accordance with the order of the

Court of Appeals, that this Court vacate and set aside judgment and award a new trial, it was the government's position that it would interpose no objection to such a motion. With respect to defendant Harrison, the government initially filed such a statement, and subsequently filed a supplemental statement of facts relative to the motion to vacate and set aside judgment and grant a new trial as to the defendant Harrison alone. This supplemental statement was filed on September 12, 1961, wherein it was the position of the government that the Court should deny such a motion on behalf of the defendant Harrison as he was represented by competent and approved counsel, Mr. Perry W. Howard, throughout all proceedings of the trial including the filing of a motion for arrest of judgment and a new trial.

7. This matter came on for hearing before this Court on behalf of each defendant on September 14, 1961, at which time counsel for all three defendants indicated that they were appointed to represent their individual defendants on the last day wherein such a motion, as contemplated by the order of the Court of Appeals, could be filed and each counsel filed such a motion in order to protect the interest of his individual defendant without consultation with his defendant. However, each counsel then stated that subsequently he had had the opportunity to confer with his defendant and that each defendant informed his counsel that he specifically did not and would not move the Court, orally or in writing, to vacate and set aside judgment and award a new trial but that should this be the decision of the Court, each defendant would accept it.

8. On oral argument, with respect to the position indicated by each defendant relative to a motion to vacate and set aside judgment and award a new trial, the government opposed such a motion on the ground that the order of the Court of Appeals specifically limited this Court to consider such a motion when filed by a defendant and that should this be done without his consent, as indicated by each counsel for his individual defendant, a substantial issue of former jeopardy would be raised at the second trial.

Conclusions of Law

1. This Court has before it for consideration an order of the Court of Appeals for the District of Columbia Circuit, as to each of the three defendants, which was filed on July 21, 1961, in the United States Court of Appeals for the District of Columbia Circuit, ordering that this Court entertain a motion by the defendant in each instance to vacate and set aside judgment and to award a new trial provided such a motion is filed on or before July 31, 1961.

2. That the supervision and control of the proceedings on appeal as to each defendant in Criminal Case No. 635-60 resides with the Court of Appeals for the District of Columbia Circuit pursuant to Rule 39a of the Federal Rules of Criminal Procedure, and that this Court has jurisdiction to consider any matters arising therein solely in accordance with the order or directions to the District Court with regard to a specific motion as outlined in said order.

3. That the motions heretofore filed by counsel for each defendant were done without the consent and not in accordance with the wishes of each defendant, as indicated in Court on September 14, 1961.

4. That the motions heretofore filed by counsel for each defendant must be treated by this Court as withdrawn.

5. That there is not now pending before this Court, and that there will not be submitted to this Court, any motion on behalf of the defendants herein to vacate and set aside judgment and to award a new trial, within the terms of the order of the United States Court of Appeals dated July 21, 1961.

6. That the purpose of the order of the Court of Appeals referred to above cannot further be carried out in the face of the unwillingness of the defendants herein to file the motions contemplated by that order, and that the case should be resubmitted to the United States Court of Appeals for further proceedings.

Wherefore, it is this 4th day of October, 1961,

ORDERED that each motion filed on behalf of each individual defendant is hereby considered as withdrawn and there being no valid

motions before this Court, no order may be made by this Court relative to the merits, if any, of a motion to vacate and set aside judgment and award a new trial.

/s/ BURNITA SHELTON MATTHEWS
JUDGE

[Filed October 12, 1962]

DENIAL OF MOTION TO DISMISS INDICTMENT
[SAMPSON]

On this 12th day of October, 1962, came the attorney of the United States; the defendant in proper person and by his attorney, I. William Stempil, Esquire; whereupon the motion of the defendant to dismiss the indictment, coming on to be heard, is argued and DENIED by the Court.

The defendant is remanded to the District of Columbia Jail.

By direction of
ALEXANDER HOLTZOFF
Presiding Judge
Criminal Court #2

[Filed October 18, 1962]

MOTION FOR REHEARING ON DENIAL OF PLEA OF FORMER JEOPARDY. [Sampson]

Now comes the defendant-petitioner Joseph R. Sampson by and through counsel and prays that this Honorable Court grant him a rehearing on the motion to dismiss the indictment against him in which he pleaded the fact that by attempting to try the defendant again, he would be subjected to double jeopardy.

The grounds for this motion for rehearing are based on the following:

1:- On the date of the oral hearing of this motion (October 12, 1962) - the Court advised counsel that it had not read the motion and relied on defendant-petitioner's counsel to recite a chronology of events, but at no time did the Court permit counsel to argue the points and authorities upon which he relied for the relief prayed.

2:- That the Court's conclusion that if defendant-appellant's counsel is correct in arguing that the Court of Appeals could not grant a new trial sua sponte (without the appellant asking for it)--that "(it seems to the Motions court) then the original judgment stands and this man should be executed." -- is an erroneous conclusion and contra to the Supreme Court ruling in Green v. U.S.-78 S. Ct. 221, 355 U.S. 184.

3:- The Motions Court conclusion that the defendant's filing of a notice of appeal at the behest of his 'counsel' -- was equivalent to a request for reversal and a new trial--is not supported by the facts in the case since the record reveals that the notice of appeal was filed the same day that the death sentence was pronounced and counsel is informed that defendant-petitioner was handed the completed form by "L. A. Harris"-his "counsel"--even before Judge Matthews made her pronouncement. (See transcript p. 8) (p. 9)

The defendant-petitioner's contention is that even if he did not sign the paper that "L. A. Harris" asked him to sign in the court room on April 21, 1961, the day the mandatory sentence was pronounced,-that paper being the notice of appeal--the appeal in his case would have been automatically processed--because Rule 37(a) Fed. Rules of Cr. Pro.-provide that " * * * The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision."

Paragraph (2) of this subdivision relating to the significant portion pertaining to the question at hand reads:- " * * * When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. * * *"

The Government, or rather the prosecution, or both, have insisted that the reason Sampson should have a new trial is because he was not represented by counsel at the 'first' 'trial' — but the record does not indicate that Sampson's 'notice of appeal' was grounded on that premise. Further,--if Paragraph (2) of the subdivision noted above is read correctly, the Clerk did not, nor did the court advise Sampson of his right to appeal nor did the clerk prepare and file the appeal as required under the rule.

4:-Your defendant-petitioner is under the impression that when the Court of Appeals issued its order of July 21, 1961 which read:

> "Upon consideration of appellee's motion to remand, it is
>
> ORDERED by the court that the motion be granted and this case is hereby remanded to the District Court with leave to entertain a motion by the defendant to vacate and set aside judgment and to award a new trial, provided that such a motion is filed on or before July 31, 1961, and it is
>
> FURTHER ORDERED by the court that in the event the District Court does not entertain such a motion to vacate and set aside judgment and to award defendant a new trial or, after entertaining and hearing such a motion, denies the same, the defendant, if he be so advised, may take an appeal therefrom, in which event the present appeal shall be reinstated and consolidated for hearing with the new appeal * * *" --------

that such an order divested the Court of Appeals of its jurisdiction of the case and that any further action was committed in error by that court-inadvertently, - in light of the circumstances.

5:- Finally, your defendant-petitioner believes that the Motions Court is in error when it states:- "You have a choice of two things. You have a choice either to have your client take a new trial or go to the electric chair." - Such a conclusion, in light of the facts in the case, is contradictory to what the Constitution provides for when it comes to

this patent question of double jeopardy.

Respectfully submitted,

/s/ I. William Stempil,
counsel for defendant-petitioner
J. B. Sampson

* * *

[Certificate of Service]

POINTS AND AUTHORITIES

1.- The record in this case Cr. 365-60

2.- The record in App. # 16,390 - USCA for the D. of C. C.

3.- The motion filed herein which was heard on October 12, 1962 pertaining to defendant's plea concerning his claim that he would be placed in double jeopardy if tried again and the points and authorities attached thereto.

4.- See Sabella v. U.S., 272 F 2nd. 206:-

" * * * It was exposure to a valid judgment of conviction that constituted defendant's initial jeopardy * * *"

In the Sampson case, the Courts have never decided or ruled that the conviction in his case was improper. (The citation by the Court of Appeals in ordering the new trial— Bell v. U.S. -- is not in point because in that case the defendant vigorously and personally prosecuted the appeal and sought the reversal.)

Continuing, from the Sabella case, supra, —

" * * * There is some degree of unreality in a claim that a convicted defendant who has been in jail has not been in jeopardy. Indeed, such a contention has been characterized as "in the vein of the Mikado," King v. U.S., 69 App. D.C. 10, 98 F.2d 291, et seq. - * * * * * As has often been pointed out, the legal lexicon knows no word more chameleon-like than "JURISDICTION." In this case the District Court did have jurisdiction in the basic sense that "a cause of action under our law was asserted here,

and the court had power to determine whether it was or was not well founded in law and effect. (Supreme Court cases cited) -- the District Court has been endowed with jurisdiction of "all offenses against the laws of the United States. 18 U.S.C. 3231."

" * * * We hold (therefore) that the first indictment placed the defendants in jeopardy since the District Court had power to render a lawful judgment of conviction."

In the Sampson case there is no question that the District Court had jurisdiction of the person and the crime involved.

As was said in the Sabella case, —

" * * * A judgment of conviction of crime may have serious consequences even if unaccompanied by a valid judgment." * * *

Even if the Court of Appeals has indicated that the sentence is invalid . . . some consideration must be given to the question of whether or not the district court had jurisdiction of the person and the offense in the first place. If it did, even if Sampson's "retained counsel" turned out to be an imposter and a fraud, a reading of the transcript of the trial indicates that the trial judge made sure that Sampson's rights to due process were protected. Therefore . . . if from prior rulings it has been decided that the sentence pronounced was invalid, the question of exposure to jeopardy has not been reckoned with and it is the contention of the present defendant-petitioner that if the court allows him to go to trial a second time because of the error claimed by the government -- than he is in double jeopardy.

In Blackstone's Commentaries, 4 - sec. 336, - we read:

" * * * a plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given or perhaps will be (being suspended by benefit of clergy or other causes), is a good plea in bar to an indictment." See also Burke's Speech on Conciliation with America, 1 Works (Bohn ed.) 467.

See also Justice Brennan's opinion in Abbate v. U.S., 359 US 187, 196, 201, 79 S. Ct. 666, 674,

" * * * The Fifth Amendment guarantees that when the Government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone * * * He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. * * * " Here, one crime was charged. The Government should have but one opportunity to prosecute on that (crime). Although in such a prosecution it may join other charges based on the same fact situation, it may not have a succession of trials seriatim. Judgment reversed."

In Green v. U.S., 78 S. Ct. 221, 355 US 185, the Supreme Court ruled:- " * * * (Therefore) it seems clear, under established principles of former jeopardy, that the defendant's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. * * * It cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." * * *

[Filed November 30, 1962]

DENIAL OF MOTION TO WITHDRAW AS COUNSEL
[WHITE]

On this 30th day of November, 1962, came the United States Attorney, the defendant in proper person and by his attorney, Richard R. Atkinson, Esquire, whereupon, the motion of counsel to withdraw as counsel for the defendant, coming on to be heard, after argument

by counsel, is by the Court denied.

The defendant is remanded to the District Jail.

By direction of

MATTHEW F. McGUIRE
Presiding Judge
Criminal Court #Assignment

[Filed January 18, 1963]

GRANTING OF DEFENSE CONTINUANCE AND DENIAL OF MOTIONS OF DEFENSE COUNSEL TO WITHDRAW FROM CASE
[Harrison, White]

On this 18th day of January, 1963, came the attorney of the United States and the defendants by their attorneys, King David, Esquire (for deft. Harrison) and Richard R. Atkinson, Esquire (for deft. White); thereupon the motion of defense counsel for the defendant Harrison for a continuance of the trial date or for leave to withdraw as counsel for the defendant, coming on to be heard, is granted only as to the continuance of the trial date; whereupon the trial date is continued from January 23, 1963 to March 18, 1963; whereupon the oral motion of defense counsel for the defendant White to be permitted to withdraw from the case as counsel for the defendant, coming on to be heard, is by the Court denied.

By direction of

MATTHEW F. McGUIRE
Presiding Judge
Criminal Court #Assignment

[Filed January 29, 1963]

ORDER

[Harrison]

Upon oral motion made in open Court by court-appointed counsel for the defendant Eddie Harrison for permission to examine and read and use the transcript made of the trial proceedings had in the above-noted case, and it appearing to the Court that such copy of the transcript is not in the files or records of the Court, it is this 28th day of January, 1963

ORDERED that the court reporters prepare and furnish a complete transcript of the trial proceedings had in the case of the United States of America v. Eddie Harrison, et al, Cr. # 365-60 to King David, Esq., a member of the District of Columbia Bar and a member of the Bar of this Court, the court-appointed counsel for the defendant Eddie Harrison.

IT IS ORDERED FURTHER that the cost of the transcript shall be borne by the United States of America with the special proviso that said transcript shall remain the property of the United States and returned to the files and made part of the record in this case after the said King David has completed his use of same.

/s/ MATTHEW F. McGUIRE
JUDGE

No Objection.

/s/ F. G. Smithson
For the United States of
America, U. S. Atty's Office

[Filed February 13, 1963]

OPPOSITION TO DEFENDANT'S MOTION TO QUASH INDICTMENT AND TO BAR FURTHER PROSECUTION ON GROUNDS OF THE DEFENDANT'S PLEA OF FORMER OR DOUBLE JEOPARDY [SAMPSON]

Comes now the United States of America by its attorney, David C. Acheson, United States Attorney in and for the District of Columbia, and in opposition to defendant's motion to quash the indictment and to bar further prosecution on grounds of the defendant's plea of former or double jeopardy, respectfully states to the Court as follows:

1. This defendant was previously tried with his codefendants on the charge of first degree murder among other charges. At this time the defendant Sampson, together with the defendant White, was represented by one "L. A. Harris," who purported to be a member of the bar of the District of Columbia but who in fact was an impostor whose true name was Daniel Jackson Oliver Wendel Holmes Morgan. Since the trial of this defendant, his supposed counsel has been tried, convicted, appealed and his conviction affirmed for various frauds which he perpetrated in his fictitious representation.

2. Following the conviction of this defendant and his codefendants, appeal was noted by each of these three defendants and a review was pending before the United States Court of Appeals for the District of Columbia Circuit as to their conviction for first degree murder and other charges when the fictitious nature of their representation by their former counsel became known to the government. As a result, the government advised the United States Court of Appeals for the District of Columbia Circuit that inasmuch as the defendants had sought proper representation of counsel for their trial, as guaranteed to them by the United States Constitution, and that inasmuch as they did not have such representation, this matter should be remanded for the defendants to file a motion asking for a new trial on the grounds of lack of representation of counsel. Each of these defendants at this hearing specifically refused to request such a new trial although each had filed an appeal for a review of his conviction. Because of the limited nature of the mandate the trial Court was

unable to grant a new trial in view of the refusal of the defendants to so move and the matter was again presented to the Court of Appeals, which, by its mandate, remanded the case as to each of these three defendants to the District Court for a new trial.

3. The defendant Joseph R. Sampson, through present counsel, now seeks to quash or dismiss the indictment and to bar further prosecution on the grounds of former jeopardy. One of the general rules in a jury case is that jeopardy attaches once a jury has been impaneled,[1/] and a defendant is not absolutely free from subsequent trial.[2/] The courts have recognized that former jeopardy does not attach and constitute a bar for a subsequent prosecution where a trial court, in its discretion, discharges a jury unable to agree,[3/] or where the court, sua sponte, dismisses the jury and orders a new trial because a juror is disqualified or biased.[4/] This Court's attention is invited to the case of Crawford v. United States, 107 U.S. App. D.C. 108, wherein a defendant was tried and convicted on a multiple count indictment with various violations of the gambling laws. When the jury reported its verdict, it reported the defendant guilty as charged and the jury was then discharged. However, subsequent information was received which caused the trial court to interrogate the jurors on the next available court day and to determine by this interrogation that certain of the jurors felt that they had not voted on the first count of the indictment. The Court of Appeals in its opinion held in the Crawford decision that this verdict was without legal effect since at the time the verdict return was made the jury had been dismissed and allowed to be dispersed before the true facts could be ascertained and the court could not then order a deliberation on the first count,

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1/ Hunter v. Wade, 169 F.2d 973 (10th Cir. 1948), aff'd, 336 U.S. 684.

2/ Himmelfarb v. United States, 175 F.2d 924 (C.A. 9), cert. denied, 338 U.S. 860.

3/ Logan v. United States, 144 U.S. 263 at 298; Perez v. United States, 22 U.S. 579.

4/ Simmons v. United States, 142 U.S. 148; Thompson v. United States, 155 U.S. 271.

leaving the trial judge with only one course - to refuse to enter sentence on the purported verdict on the first count, setting aside that verdict. There seems there had been displayed a considerable degree of confusion as to the remaining counts and the fact that the jury could not be reassembled, it was within the discretion of the trial court to set aside the entire verdict and order a new trial. In conclusion, the Court of Appeals held that under these circumstances this case is well within the class of cases in which the defendant's right to be free from subsequent jeopardy must "be subordinated to the public's interest in fair trials designed to end in just judgments."

4. A similar circumstance occurred in the Fifth Circuit in Gondron, et al v. United States, 242 F.2d 149, wherein the Court of Appeals reversed the defendants' convictions for importation, concealment and transportation and transfer of marihuana. Here the government by motion advised the court that the convictions might have been tainted by untrue and false testimony of a key witness and the government conceded that a new trial should be granted. Upon retrial the defendants were convicted and attempted to impose the bar of former jeopardy to the second conviction. The Court of Appeals on its review, 256 F.2d 205, held that where a Court of Appeals by its mandate and judgment reversed the judgment of conviction of a defendant in a former trial and remanded the case to trial court for a new trial, a defendant could not plead double jeopardy on the theory that his prior conviction was not reversed on appeal but set aside on the government's motion.

WHEREFORE, the premises considered, it is respectfully submitted that the Court should deny the defendant's motion.

/s/ David C. Acheson
United States Attorney

/s/ Frederick G. Smithson
Assistant United States Attorney

[Certificate of Service]

[Filed Feb. 19, 1963]

MEMORANDUM
[JOSEPH R. SAMPSON]

The defendant's motion to quash the indictment and to bar further prosecution on the grounds of former or double jeopardy is denied.

/s/ Edward A. Tamm
JUDGE

Dated: 2/18/63

[Filed March 29, 1963]

MOTION TO DISMISS INDICTMENT
[EDDIE M. HARRISON]

Now comes Eddie M. Harrison, the defendant in the above-entitled cause, by and through his attorney, George J. Thomas, and knowing of the indictment herein, and trial having been set thereon to commence on the 8th day of April, 1963, says that the United States ought not to further prosecute the said indictment against the said Eddie M. Harrison in respect to the said indictment mentioned for the following reasons:

1. Heretofore, to-wit, on the 19th day of April, 1960, defendant was indicted by a grand jury in and for the District of Columbia in the District Court of the United States for said District, a copy of said indictment being attached hereto and marked "Exhibit A," and thereafter said defendant pleaded not guilty and the case was tried on said indictment before a jury in said court which had jurisdiction of the cause, and on the 19th day of October, 1960, the jury in said case rendered a verdict of guilty of the offense set forth in Count two (2) of said indictment, that is guilty of murder in the first degree, of which the said defendant was accused in the said last-mentioned two (2) Count indictment, on which verdict judgment was entered, as by the record thereof in said Court remaining, all of which more fully and at large appears.

2. That the said judgment and conviction as set forth in paragraph one (1) has been by the United States Court of Appeals for the District of Columbia vacated and set aside and a new trial awarded without the consent and against the will and wishes of the said Eddie M. Harrison, and without appeal, motion or request on his part, the said Eddie M. Harrison; further that the said defendant was requested to motion to this Honorable Court to vacate and set aside judgment and award new trial, as said, and specifically refused to so move and personally appeared in this Court and withdrew such a Motion, as said, which had been filed in his behalf, but without his knowledge, by Jacob N. Halper, Esquire, court-appointed counsel for the said defendant, Eddie M. Harrison; that further on the 30th day of June, 1961, the government by and through United States attorney, David C. Acheson, moved this Honorable Court to appoint counsel for said defendant and specifically suggested that a motion be filed by such counsel to determine whether said defendant enjoyed his constitutional rights to the effective assistance of counsel; that thereafter said defendant continued to refuse to allow such motion to be filed in his behalf; that thereafter the government filed a "Statement Of Facts Relative To Motion To Vacate and Set Aside Judgment and to Grant A New Trial" in which the government suggested to the Court that the defendant express in writing his desire that this Court Vacate and set aside judgment and sentence and grant a new trial to which the government would not interpose an objection to such said motion and that the said defendant refused to do this or to allow anyone to so move in his behalf but that such a Motion was made in his behalf where upon defendant personally appeared in Court and withdrew such said Motion; that it is clear that the government, by and through the United States Attorney, has by its own movements, suggestions and actions brought about the destruction of the verdict, judgment and sentence in this cause; that the said Court of Appeals, acted, in issuing its Per Curiam Order vacating and setting aside judgment and awarding a new trial to defendant and for appellant, on its own iniative and without appeal

or request or consent or motion on the part of the defendant, Eddie M. Harrison (see Per Curiam Orders dated July 21, 1961 and January 26, 1962 and May 17, 1962.

3. The said Eddie M. Harrison so tried and convicted is one and the same person as the defendant in this cause, and not another or different person.

4. The offense of which the said defendant was tried and convicted as aforesaid was two (2) counts charging in count one (1) first degree murder and count two also first degree murder (Felony Murder doctrine) of which he was convicted and are the same offenses and/or is the same offense of which the defendant is now charged by the indictment herein.

WHEREFORE, he prays judgment if the government of the United States ought further to prosecute said indictment against him, the said Eddie M. Harrison, in respect to the said offense, and that he, the said Eddie M. Harrison, may be dismissed and discharged from said indictment.

Dated: /s/ Eddie M. Harrison
Defendant

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA, SS:

Eddie M. Harrison, the defendant in the above entitled indictment, being duly sworn, says that he has heard the foregoing plea read, has read it himself, knows the contents thereof and that the same is true of his own knowledge.

/s/ Eddie M. Harrison
Defendant

[JURAT - Dated March 29, 1963.]

[Certificate of Service]

POINTS AND AUTHORITIES

Rule 12 (b) Federal Rules of Criminal Procedure

5th Amendment, United States Constitution

Ex Parte Lange, 1873, 18 Wall 163

United States v Ball 163 U.S. 662 (1896)

Green v United States 355 U.S. 184 (1957)

22 C.J.S. Section 271, P. 696, 697, People v McGrath 202 N. Y. 445 (1911)
People Ex. Rel. Ostwald v Craver, 65 N. Y. S. 2nd 748 (1946)
McIntosh, Judge v Watts, 5 S. W. 2nd 1003 (1928)
State v Oglesby 113 So. 865 (1927)

[Filed April 4, 1963]

MOTION TO DISMISS INDICTMENT
[ORSON G. WHITE]

Now comes Orson G. White, the defendant in the above-entitled cause, by and through his attorney, Richard R. Atkinson, and knowing of the indictment herein, and trial having been set thereon to commence on the 8th day of April, 1963, says that the United States ought not to further prosecute the said indictment against the said Orson G. White in respect to the said indictment mentioned for the following reasons:

1. Heretofore, to-wit, on the 19th day of April, 1960, defendant was indicted by a grand jury in and for the District of Columbia in the District Court of the United States for said District, a copy of said indictment being attached hereto and marked "Exhibit A", and thereafter said defendant pleaded guilty and the case was tried on said indictment before a jury in said Court which had jurisdiction of the cause, and on the 19th day of October, 1960, the jury in said case rendered a verdict of guilty of the offense set forth in count two (2) of said indictment, that is guilty of murder in the first degree, of which the said defendant was accused in the said last-mentioned two (2) count indictment, on which verdict judgment was entered, as by the record thereof in said Court remaining, all of which more fully and at large appears.

2. That the said judgment and conviction as set forth in paragraph one (1) has been by the United States Court of Appeals for the District of Columbia vacated and set aside and a new trial awarded without the consent and against the will and wishes of the said Orson G. White, and without appeal, motion or request on his part, the said Orson G. White;

further that the said defendant was requested to motion to this Honorable Court to vacate and set aside judgment and award new trial, as said, and specifically refused to so move and personally appeared in this Court and withdrew such a Motion, as said, which had been filed in his behalf, but without his knowledge, by Court appointed counsel for said defendant, Orson G. White; that further on the 30th day of June, 1961, the government by and through United States attorney, David C. Acheson, moved this Honorable Court to appoint counsel for said defendant and specifically suggested that a motion be filed by such counsel to determine whether said defendant enjoyed his constitutional rights to the effective assistance of counsel; that thereafter said defendant continued to refuse to allow such motion to be filed in his behalf; that thereafter the government filed a "Statement Of Facts Relative To Motion To Vacate and Set Aside Judgment and To Grant A New Trial" in which the government suggested to the Court that the defendant express in writing his desire that this Court vacate and set aside judgment and sentence and grant a new trial to which the government would not interpose an objection to such said motion and that the said defendant refused to do this or to allow anyone to so move in his behalf but that such a Motion was made in his behalf where upon defendant personally appeared in Court and withdrew such said Motion; that it is clear that the government, by and through the United States Attorney, has by its own movements, suggestions and actions brought about the destruction of the verdict, judgment and sentence in this cause; that the said Court of Appeals acted, in issuing its Per Curiam Order Vacating and Setting Aside Judgment and Awarding a New Trial for the Defendant and for Appellant, on its own iniative and without appeal or request or consent or motion on the part of the defendant, Orson G. White (see Per Curiam Orders dated July 21, 1962 and May 17, 1962.

3. The said Orson G. White so tried and convicted is one the same person as the defendant in this cause, and not another or different person.

4. The offense of which the said defendant was tried and convicted as aforesaid was two (2) counts charging in count one (1) first degree murder and count two also first degree murder (Felony Murder doctrine)

of which he was convicted and are the same offenses and/or is the same offense of which the defendant is now charged by the indictment herein.

WHEREFORE, he prays judgment if the government of the United States ought further to prosecute said indictment against him, the said Orson G. White, in respect to the said offense, and that he, the said Orson G. White, may be dismissed and discharged form said indictment.

Dated:

/s/ Richard R. Atkinson
Attorney for Orson G. White

* * * * *

[Certificate of Service]

[Filed April 4, 1963]

POINTS AND AUTHORITIES

Rule 12 (b) Federal Rules of Criminal Procedure

5th Amendment, United States Constitution

Ex Parte Lange, 1873, 18 Wall 163

United States v Ball 163 U.S. 662 (1896)

Green v United States 355 U.S. 184 (1957)

22 C. J. Section 271, p. 696, 697, People v McGrath 202 N.Y. 445 (1911)

People Rel. Ostwald v Craver, 65 N. Y. S. 2nd 748 (1946)

McIntosh, Judge v Watts, 5 S. W. 2nd 1003 (1928)

State v Oglesby 113 So. 865 (1927)

Clawins v Rives, 70 U. S. Appeals D. C. 107

Respectfully,

/s/ Richard R. Atkinson

[Filed April 5, 1963]

[Clerk's Certificate - Denial of Motions to Dismiss the Indictment]

[#1 - EDDIE M. HARRISON]
[#2 - ORSON G. WHITE]

On this 5th day of April, 1963, came the attorney of the United States; the defendants in proper person and by their attorneys, #1 - George J. Thomas, Esq., and #2 - R. R. Atkinson, Esq.; whereupon the defendants' motions to dismiss the indictment, coming on to be heard, after argument by counsel, are by the Court denied.

By direction of

Burnita Shelton Matthews
Presiding Judge
Criminal Court # 3

* * *

* * *

[Filed April 23, 1963]

MOTION FOR ISSUANCE OF SUBPOENA
[EDDIE HARRISON]

Comes now the defendant in the above-entitled cause, Eddie Harrison, and moves the Court to order the issuance of subpoenas on behalf of the defendant for the following named witnesses:

Robert V. Murray - Chief of Police

Luke Moore - U.S. Marshal

Daniel Morgan alias L. A. Harris

/s/ I. Wm. Stempil
Attorney for Defendant

Above Motion Granted.

_____
JUDGE

Dated: _____

Service of copy of above Motion and Affidavit in Support acknowledged this day of _____, 19____.

UNITED STATES ATTORNEY
By: _____

[Filed April 23, 1963]

AFFIDAVIT IN SUPPORT OF MOTION FOR ISSUANCE OF SUBPOENA

DISTRICT OF COLUMBIA, to wit:

I, Eddie Harrison, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and in support of the annexed motion, in compliance with the requirements of Rule 17(b) of the Federal Rules of Criminal Procedure, state as follows:

1. That the names and addresses of the witnesses referred to in the annexed motion are:

   Theodore Cogswell - Register of Wills - U.S. Ct. House Wash D. C.

   Mary A. Silver - Dept. of Motor Vehicles - Municipal Center, Wash. D. C.

   Hon. John Lewis Smith, Esq. Chief Judge Ct. of Gen. Sessions D. C.

2. That the testimony which he (or they) is expected to give, if subpoenaed, is: Concerning the veracity of the witness for the Gov. Thomas Leon Young and facts concerning the validity of a committing Magistrate of U. S. Comm. on Mar. 20, 1960.

3. That the evidence of the witness or witnesses is material to the defense because - it will disapprove prosecution's contentions concerning voluntary confessions - availability of committing magistrates and veracity of prosecution's witnesses.

4. That I cannot safely go to trial without the said witness or witnesses.

5. That I do not have sufficient means and am actually unable to pay the fees of the witness or witnesses.

/s/ Eddie M. Harrison

[JURAT - Dated April 23, 1963]

[Filed April 23, 1963]

[Clerk's Certificate - Denial of Motion for Issuance of Subpoena]

[1. EDDIE M. HARRISON]

On this 23rd day of April, 1963, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the trial of which was respited yesterday; whereupon the motion of Attorney Stempil for issuance of subpoena coming on to be heard, is by the Court denied.

By direction of

Alexander Holtzoff
Presiding Judge
Criminal Court # ONE

* * *

* * *

[Filed May 8, 1963]

NOTE FROM THE JURY

Your Honor -

Would you kindly furnish the testimony of the following:

1. Guard Lt. of D. C. prison
2. Short
3. Kelley
4. Daley
5. Valentine
6. Young
7. All defendants
8. All photos and mug shots

/s/ A. P. Wade
Foreman

[Filed May 8, 1963]

VERDICT OF THE JURY
[1. EDDIE M. HARRISON]
[2. ORSON G. WHITE]
[3. JOSEPH R. SAMPSON]

On this 8th day of May, 1963, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the trial of which was respited yesterday; whereupon the said jury upon their oath say that each defendant is guilty of first degree murder with a recommendation for life imprisonment; thereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that each defendant is guilty of first degree murder with a recommendation of life imprisonment.

The case is referred to the Probation Officer of the Court. The defendants are remanded to the District of Columbia Jail.

By direction of
Alexander Holtzoff
Presiding Judge
Criminal Court # ONE

* * *

* * *

[Filed May 14, 1963]

MOTION FOR JUDGMENT OF ACQUITTAL, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL
[EDDIE M. HARRISON]

Comes now the defendant, Eddie M. Harrison, by and through his counsel, George J. Thomas, and in support of said Motion for Judgment of Acquittal, or, in the Alternative, for a New Trial, represents to this Honorable Court as follows:

1. The Court erred in denying defendant's motion to dismiss the indictment herein.

2. The Court erred in denying defendant's motion for directed

verdict of acquittal in that the conviction of the defendant was founded solely on the alleged confessions, both oral and written, made to both the police and to jail (interns) officials, and that there was not independent of the said alleged confessions other evidence to support such confessions.

3. That the Court erred in admitting into evidence the alleged oral and written confessions of said defendant.

4. That the Court erred in admitting into evidence the alleged oral confessions made by the other two defendants before the defendant, Harrison, at the D. C. Jail.

5. That the Court erred in admitting into evidence Government's Exhibit 18B, allegedly a confession made by defendant, Harrison, to a jail (intern) official.

6. The Court erred in not allowing counsel for defendant, Harrison, to cross-examine police officers Daly and Pixton on matters involving their credibility.

7. The Court erred in not granting Motions for Mistrial made by counsel for defendant, Harrison.

8. The Court erred in denying defendant's motion for a directed verdict of acquittal in that there was insufficient evidence to show an attempt to commit a robbery on the part of said defendant.

9. And for such other and further reasons as will be brought forth at the hearing of this motion.

/s/ George J. Thomas
Attorney for Defendant,
Eddie M. Harrison

* * *

POINTS AND AUTHORITIES

Forte v. U. S., 68 App.D.C. 111 ( )

Harling v. U.S., 111 App. D.C. 174 (1961)

Lindsey v. U.S., 77 App. D.C. 1 ( )

Mallory v. U.S., 354 U.S. 449 (1957)

[Certificate of Service]

[Filed May 13, 1963]

(1) MOTION FOR A NEW TRIAL AND/OR
(2) MOTION FOR ARREST OF JUDGMENT
[JOSEPH R. SAMPSON]

Comes now Joseph R. Sampson, a defendant in the above noted action, by and through counsel and prays that this Honorable Court grant his motion for a new trial and/or a motion for arrest of judgment for the following reasons:

1: - It would be in the interest of justice to correct such a miscarriage of justice as occurred in the instant trial;

2: - The defendant Joseph R. Sampson was denied a fair trial to such an extent that the error in this regard affected the fairness of the judicial proceeding;

3: - The defendant's constitutional rights were seriously affected by the Court's refusal to grant his motion to dismiss the indictment on the grounds that to be tried again would be in violation of the Fifth Amendment as it pertains to double jeopardy since the defendant had already been tried once and convicted once before and sentenced once before by another court as noted in the record of this case;

4: - The defendant's constitutional rights under the Sixth Amendment were violated by the trial Court in that he was denied the right to have compulsory process for obtaining witnesses in his favor and was denied the right to have a trial before an impartial jury.

5: - The Court's conduct towards the defendant's counsel in the presence of the jury created a situation wherein it not only belittled defendant's counsel in the eyes of the jury but also served to unnerve him to such an extent and throw him off balance to such a degree that he could not devote his best talents to the defense of Joseph R. Sampson.

6: - The actions of the trial court in arbitrarily denying defendant's counsel to thoroughly explore the credibility of the prosecution's witnesses within the scope of the direct examination prejudiced the defendant's rights to a fair trial;

7: - The remarks of the trial Court to counsel for the defendant in the presence of the jury insinuated that the actions of defendant's counsel were unethical and prejudiced the defendant's cause before the jury;

8: - The verdict was contrary to the weight of the evidence;

9: - The Court erred in sustaining objections to the questions asked of the witnesses Daly, Young, Hartnett, Kelly, Pixton and Mode when called upon to answer by the defense;

10: - The Court erred in allowing the prosecutor to testify in the case without being first put under oath;

11: - The Court erred in denying the defendant's motion for a mistrial after the defendant was exposed to the jury's view in chains, handcuffs and legirons for a reason that was the Government's fault:

12: - The Court erred in refusing to charge the jury as requested;

13: - The defendant was substantially prejudiced by the Court's actions against the counsel for defendant in refusing to allow him proper cross examination and striking pertinent questions vital to the defense of Joseph R. Sampson;

14: - The verdict is not support by substantial evidence;

15: - The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

Dated this 13 day of May, 1963.

/s/ I. William Stempil
Counsel for Defendant Sampson

* * *

POINTS AND AUTHORITIES

1: - The record herein.

2: - The transcript of the trial had beginning April 22, 1963 through May 8, 1963.

3: - Rule 33 Fed. R. of Cr. P.

[Certificate of Service]

[Filed May 24, 1963]

[Clerk's Certificate - Denial of Motions]

[EDDIE M. HARRISON]
[JOSEPH R. SAMPSON]

On this 24th day of May, 1963, came the attorney of the United States, the defendants in proper person and by their attorneys, George J. Thomas, Esq. and I. William Stempil, Esq.; whereupon the motion of defendant Harrison for a judgment of acquittal or in the alternative for a new trial coming on to be heard, is by the Court denied; and thereupon the motion of defendant Sampson for new trial and/or for motion in arrest of judgment coming on to be heard, after argument by counsel, is by the Court denied.

The defendants are remanded to the District of Columbia Jail.

By direction of

Alexander Holtzoff
Presiding Judge
Criminal Court # ONE

* * *

* * *

[Filed June 4, 1963]

PRAECIPE
[#2 ORSON G. WHITE]

PRAECIPE AND NOTICE OF MOTION

TO THE ASSIGNMENT CLERK OF THIS MOST HONORABLE COURT.

Please Assignment Clerk of this Most Honorable Court. Assign the attached Motion for Judgment of Acquittal or in the Alternative for a New Trial to the Honorable Judge Alexander Holtzoff to be handled immediately.

/s/ Orson X. G. White

* * *

[JURAT - Dated June 4, 1963]

[Filed June 4, 1963]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED WITHOUT PRE-PAYMENT OF COST OR FEES PURSUANT TO TITLE 28 UNITED STATES CODE - SECTION 1915

Comes now, Orson X.G. White, being first duly affirmed according to law, depose and say that I am the Petitioner in this cause of action, and in support of my application for Leave to Proceed Without being Required to Prepay fees or costs states as follows:

1. I am a citizen of the United States of America

2. That because of my poverty I am unable to prepay the costs or fees of said suit or action.

3. That I am unable to give security for same.

4. That I believe I am entitled to the redress I seek.

5. That the nature of my cause of action is briefly stated as follows:

Respectfully Submitted in Good Faith,

/s/ Orson X.G. White

* * *

[JURAT - June 4, 1963]

[Filed June 5, 1963]

THE RULES 33 AND 29 ARE THE PROPER F.R. C.P. PURSUANCE MOTION FOR JUDGMENT OF ACQUITTAL, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Comes now the Defendant, Orson X.G. White, being first duly affirmed according to law depose and say that I am the Defendant in the above entitled cause of action and in support of said motion for judgment of acquittal or in the alternative for a new trial, represents to this Honorable Court as follows:

1. The Court erred in denying Defendant's motion to dismiss the indictment herein.

2. The Court erred in denying Defendant's motion for directed verdict of acquittal in that the conviction of the defendant was founded solely on the alleged confessions, both the oral and written made to the Police and that there was not independent of the said alleged confessions other evidence to support such confessions.

3. That the Court erred in admitting into evidence the allege oral and written confessions of said defendant.

4. The Court erred in denying Defendant's Motion for a Direct Verdict of Acquittal in that there was insufficient evidence to show an attempt to commit a robbery on the part of said Defendant.

5. The Court erred by sending into the jury room a photograph of Defendant which was taken of Defendant in a prior commitment in 1957 to the District Jail and in no way could have shown that I was beaten by Policemen, in March of 1960.

6. The Court erred in not acquitting defendant, when the jury returned a verdict contrary to your instructions and the Government's evidence.

7. The Court erred in not instructing the jury that if they believe the alleged confessions that they should find Defendant White, not guilty.

8. The Court erred in not fully instructing the jury on abandonments.

9. And for such other and further reasons as will be brought forth at the hearing of this Mother.

CONCLUSION

Wherefore Defendant Orson X.G. White moves this Most Honorable Court to award Defendant White a Judgment of Acquittal or in the alternative for a new trial for Defendant will forever pray.

Respectfully Submitted in Good Faith,

/s/ Orson X.G. White

POINTS AND AUTHORITIES

Mallory v. U.S. 354 U.S. 449 (1957)

[Certificate of Service]

[JURAT - Dated June 4, 1963]

[Filed June 10, 1963] [Motion denied. /s/ Holtzoff,J.-June 8, 1963]

[Filed June 18, 1963]

JUDGMENT AND COMMITMENT
[EDDIE M. HARRISON]

On this 14th day of June, 1963 came the attorney for the government and the defendant appeared in person and by his attorney, George J. Thomas, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of FIRST DEGREE MURDER as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of the term of his natural life.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge.

The Court recommends commitment to: a Federal institution of the maximum security type.

* * *

[Filed June 18, 1963]

JUDGMENT AND COMMITMENT
[ORSON G. WHITE]

On this 14th day of June, 1963 came the attorney for the government and the defendant appeared in person and by his sttorneys, William A. Davis and Richard Atkinson, Esquires

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of FIRST DEGREE MURDER as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of the term of his natural life.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge.

The Court recommends commitment to: a Federal institution of the maximum security type.

* * *

[Filed June 18, 1963]

JUDGMENT AND COMMITMENT
[JOSEPH R. SAMPSON]

On this 14th day of June, 1963 came the attorney for the government and the defendant appeared in person and by his attorney, I. William Stempil, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of FIRST DEGREE MURDER as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of the term of his natural life.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge.

The Court recommends commitment to: a Federal institution of the maximum security type.

* * *

[Filed June 24, 1963]

NOTICE OF APPEAL
[JOSEPH RAY SAMPSON]

Name and address of appellant JOSEPH RAY SAMPSON

200 - 19th Street, S.E.
Washington, D. C.

Name and address of appellant's attorney

I. William Stempil-659 Warner Building-501-13 St. NW
Washington, D. C.

Offense First Degree Murder

Concise statement of judgment or order, giving date, and any sentence

Guilty of first degree murder-unanimous recommendation by jury for the prisoner to be sentenced to life imprisonment - Verdict - May 8, 1963-Sentence-June 14, 1963 by Holtzoff, J.

Name of institution where now confined, if not on bail

D. C. Jail-200-19 Street SE-Washington, D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

/s/ Joseph Ray Sampson
Appellant

/s/ I. William Stempil
Attorney for Appellant.

Date June 24, 1963

[Filed June 20, 1963]

NOTICE OF APPEAL
[ORSON G. WHITE]

Name and address of appellant Orson X.G. White

200-19th Street SE. Washington 3, D. C.

Name and address of appellant's attorney

Former Attorney - Mr. Richard R. Atkinson, 626 Third Street Northwest Washington D. C.

Offense - Violation of the Title 22 of the District of Columbia Code Section 2401

Concise statement of judgment or order, giving date and any sentence

A verdict of guilty was brought back against Appellant as Charged on 5-8-63 and he was sentence to life before Judge Alexander Holtzoff, on Friday June 14th 1963.

Name of institution where now confined, if not on bail

District of Columbia Jail 200-19th Street S.E. Washington D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

6-17-63
Date

/s/ Orson G. White
Appellant

Attorney for Appellant

[Filed June 20, 1963]

NOTICE OF APPEAL
[EDDIE M. HARRISON]

Name and address of appellant

Eddie M. Harrison

District of Columbia Jail

Name and address of appellant's attorney

None

Offense - 1st degree murder, 22 D.C. Code 2401

Concise statement of judgment or order, giving date, and any sentence

Guilty to offense indicated above by jury on May 8th 1963. Sentenced on June, 14, 1963 to life imprisonment

Name of institution where now confined, if not on bail

District of Columbia Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment

/s/ Eddie M. Harrison
Appellant

Attorney for Appellant.

Date - June 14th 1963

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDDIE M. HARRISON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	)	No. 17,991

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Co-Counsel:

George J. Thomas, Esq.
412 Fifth Street, N. W.
Washington, D. C.

Of Counsel:

Charles A. Miller, Esq.
Thomas B. Donovan, Esq.
701 Union Trust Building
Washington 5, D. C.

December 5, 1963

Alfred V. J. Prather
701 Union Trust Building
Washington 5, D. C.

Attorney for Appellant
By Appointment of this Court

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

EDDIE M. HARRISON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 17,991

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In connection with two of the questions raised by this appeal, the Government's brief urges reliance on precedents that are irrelevant to this case.

1. The Government asserts that this Court's decision in Pea v. United States, No. 17824, October 10, 1963, disposes of the appellant Harrison's claim of double jeopardy. This assertion is without merit for several reasons:

(a) This Court's opinion in the Pea case does not even mention double jeopardy.

(b) The appellant's brief in the Pea case did not list an issue of double jeopardy among the "Questions Presented" by the appeal, although such an issue was suggested in the text of the brief.

(c) In the Pea case the Government pointed out, at page 5 of its brief to this Court, that Pea had waived any possible claim of double jeopardy by personally and expressly supporting an appeal from his first conviction. No such waiver is involved here. See appellant Harrison's brief, pp. 43-44.

2. At the trial the Government correctly argued that the appellant Harrison was subject to the jurisdiction of the juvenile authorities when he was being questioned in connection with this case, and that until the Juvenile Court had waived jurisdiction he could not have been charged with the crime for which he was convicted below or given a preliminary hearing as his adult co-defendants were. (See Tr. 499-504, set forth in full at pp. 8-12 of appellant Harrison's brief.) Now, however, the Government denies the existence of any parens patriae

relation to the appellant Harrison, and seeks to justify his conviction by use of statements elicited from him prior to waiver of Juvenile Court jurisdiction by imposing limitations on this Court's opinion in Harling v. United States, 111 U.S. App. D.C. 174, 295 F.2d 161 (1961).

The Government seeks to distinguish Harling's case by saying that his "statements were given after he was committed to the custody of juvenile authorities," whereas "The present case is not a case where the juvenile court processes were used or misused to obtain evidence for adult proceedings." This distinction is without merit. In the first place, the statements excluded in the Harling case were elicited by robbery squad detectives at police headquarters. Harling had been "committed to the custody of juvenile authorities" only in the same way that the appellant Harrison was in this case when he, like Harling, was sent to the receiving home overnight during his first questioning. (See appellant Harrison's brief, p. 6).

The more fundamental objection to the Government's position, however, is this: the parens patriae relationship between the Government and one who commits a crime as a juvenile exists as a matter of statutory law from the time of the crime until such time as the Juvenile Court makes it otherwise by deciding that there should be a District Court

trial rather than a Juvenile Court proceeding. The relationship is not one to be bestowed or withheld at will by the police, by an election to turn the prisoner over to the custody of the juvenile authorities.

The question is not, as the Government argues, "whether the juvenile court processes were used or misused to obtain evidence for adult proceedings." Rather, the question is whether incriminating statements used in adult proceedings were elicited while the defendant was subject to the processes of the Juvenile Court rather than the District Court. The juvenile processes "must be insulated from the adult proceeding," and hence admissions made prior to waiver of Juvenile Court jurisdiction must be "excluded from evidence in the criminal proceeding." Harling v. United States, 111 U. S. App. D.C. 174, 177, 295 F.2d 161, 164 (1961).

The cases cited by the Government to support admission of the statements given by the appellant Harrison prior to waiver of Juvenile Court jurisdiction and commencement of adult criminal proceedings against him are wide of the mark.[1/] They do not purport to deal with the question of

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1/ United States v. Carignan, 342 U.S. 36 (1951); Morgan v. United States, 111 U.S. App. D.C. 127, 294 F.2d 911 (1961).

crime by juveniles or confessions thereof prior to waiver of Juvenile Court jurisdiction.

Respectfully submitted,

/s/ Alfred V. J. Prather

Alfred V. J. Prather
701 Union Trust Building
Washington 5, D. C.

Attorney for Appellant
By Appointment of this Court

Co-Counsel:

George J. Thomas, Esq.
412 Fifth Street, N. W.
Washington, D. C.

Of Counsel:

Charles A. Miller, Esq.
Thomas B. Donovan, Esq.
701 Union Trust Building
Washington 5, D. C.

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of December 1963 served a copy of the foregoing Reply Brief upon Frank Q. Nebeker, Esq., Assistant United States Attorney, at his office in the United States Courthouse, Washington 1, D. C.

/s/ Alfred V. J. Prather

Alfred V. J. Prather

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17991, 17992, 17993

EDDIE M. HARRISON, No. 17991, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORSON WHITE, No. 17992, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JOSEPH R. SAMPSON, No. 17993, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
FREDERICK G. SMITHSON,
WILLIAM H. WILLCOX,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) Whether *Mallory* bars the confessions of White and Sampson and whether *Harling* bars the confession of Harrison?

(2) Whether appellants' second trial, following their first trial in which they were represented by the imposter Morgan, violated their right not to be placed twice in jeopardy for the same offense?

(3) Whether appellants were denied their right to a speedy trial?

(4) Whether the judge's management of the trial deprived appellants of a fair trial?

714-311—63——1

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17991, 17992, 17993

EDDIE M. HARRISON, No. 17991, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORSON WHITE, No. 17992, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JOSEPH R. SAMPSON, No. 17993, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 19, 1960, Appellants Harrison, White and Sampson were indicted for the premeditated murder and felony-murder (murder in the course of an attempted robbery) of George Brown. After trial by jury in September and October 1960, appellants were convicted of felony murder and sentenced to death.[1] Two of the appellants were represented at this trial, and all of them were represented at argument of

[1] The District Court dismissed the premeditated murder count.

new trial motions and sentencing, by the imposter Morgan, who was unmasked after the sentence was imposed (J.A. 3–6). Therefore this Court, in June 1962, ordered a new trial for appellants. The trial took place in April 1963. The jury convicted all three appellants of felony-murder and recommended life imprisonment for each (J.A. 36).[2] They were duly sentenced and this appeal followed (J.A. 43–47).

The crime

On March 8, 1960, between 9:00 and 9:30 a.m., Mrs. Ethel McCoy was in her home at 1708 4th Street, N.W. (Tr. 142). She "heard this loud noise go off" (Tr. 144). She ran into the street (Tr. 144). She saw "two boys * * * coming out of [Mr. Brown's] house across the street * * * his house is facing the house I live in" (Tr. 145). "I saw one boy [the one who came out of the house last—Tr. 146] come out of the door and put something under his coat, a gun" (Tr. 144). The gun looked like a sawed-off shotgun (Tr. 145–146).

The police arrived about 9:20 a.m. They went to the premises 1713 4th Street (Tr. 229). Captain Daly: "It was a two-story brick house with an iron fence in the front * * * I went up to the front entrance * * * it's a door that's frame half-way up and glass the other way. The glass was broken out. We tried to open the door. We couldn't open the door. We looked through the broken glass and there was a body just inside the door. The body was lying on the knees, with the chest and head up against the door. It was a huge man" (Tr. 230). Captain Daly gained entry through the house next door (Tr. 230–231). There were holes in the wall "directly behind where the body was" (Tr. 231). Some lead pellets were "dug out of the wall in the hallway" (Tr. 240). A "piece of shotgun wadding" was found on or near the body (Tr. 239). The decedent had "a large roll of money on him" (Tr. 514). There was no gun on or near the body (Tr. 515).

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[2] The first trial took place when the first degree murder penalty statute required the death penalty. 22 D.C. Code § 2404 (1925). The second trial took place after the statute had been amended to permit the jury to recommend life imprisonment. 22 D.C. Code § 2404 (1962).

The dead man was George Henry "Cider" Brown, a gambler, who lived in the house where he was found dead (Tr. 110, 115, 116, 635). He was six feet tall (Tr. 122). The doctor who performed the autopsy testified that Brown "had sustained a gunshot wound of the face * * * There was a gaping macerated wound 3½ inches by 1½ inches on the right side of the face. The right eyeball had been destroyed. The bones of the right orbit—the orbit is the socket in which the eyeball rests—and the right cheekbone were minutely fragmented, as were the palatine—that is the roof of the mouth—bones, and the base of the skull. The charge entered the skull, macerating the brain along its course. Its direction was from front to back, approximately horizontal and slightly from right to left" (Tr. 123). Wadding and shotgun pellets were taken from Brown's body (Tr. 124). The cause of death was "shotgun wound of the face, injuring the brain, with the accompanying hemorrhage and shock" (Tr. 125).

The confessions

(a) White and Sampson

White and Sampson were arrested on the evening of Sunday, March 20 (Tr. 711, 828, 1018, 1024, 1025). On that evening both gave signed written confessions to the murder of George Brown, which stated as follows:

White and Sampson each stated that they, together with Harrison, planned to rob Brown. On the morning of March 8 they were in a Buick car belonging to one James Evans.[3] They saw Brown at Keys Restaurant, and followed him from there to his house in the Buick.[4] Sampson waited in the car a block

[3] James Evans testified that he was with the defendants Harrison, White and Sampson at the Keys Restaurant, 7th and T Streets, N.W., around 10:00 or 11:00 p.m., on the night of March 7, 1960 (Tr. 275). The four of them went that night to Evans' home, where Evans loaned Harrison his 1951 Buick sedan (Tr. 223, 226–227). Evans told Harrison to "be sure to have it to me in the morning at the shop," but Harrison did not return it for two days (Tr. 227).

[4] Thomas Young testified that he saw George Brown at 8:45 or 8:50 on the morning of March 8, 1960, when he came to the Keys Restaurant and sat with Brown in a booth there (Tr. 627–628). Young saw Sampson in the restaurant, and observed Sampson looking at him and Brown as they were sitting in the booth (Tr. 629–630). Young and Brown left the restaurant

or so from Brown's house while White and Harrison, who carried a shotgun, went to rob Brown. White stated that he and Harrison went to Brown's house. They knocked several times. White then told Harrison they should go. Brown came to the door, opened it, and slammed it. White ran. "Then I heard a noise like a blast and then glass breaking" (Tr. 821). Harrison and White both ran from the scene and Sampson picked them up. Sampson stated that he heard what sounded like a shot, then saw Harrison and White running, and picked them up in the car. Sampson and White both stated that the trio stayed together for some time and then dispersed (Tr. 464–470, 817–825).[5]

(b) Harrison

Harrison became 18, according to his own statement, on March 18, 1960 (Tr. 481, 1293–1294). On the morning of Saturday, March 19, he was brought before the Municipal Court for the District of Columbia, charged with a March 18 housebreaking. Harrison waived a preliminary hearing in Municipal court, bond was set at $5,000, and he was committed to jail to await the action of the grand jury. Municipal Court Criminal Docket No. U.S. 1844–60; District Court Criminal No. 364–60; see also Tr. 482, 905.[6]

Shortly after 8:00 a.m. on the morning of Monday, March 21, 1960, Captain Daly took White and Sampson with him to the D.C. jail and requested an interview with Harrison there (Tr. 474–476). Harrison signed a form consenting to see Daly

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about 9:00 a.m. (Tr. 628). "Sampson came out behind us * * * I would say the only thing that made me particularly look at him was when we came out I hear the door slam behind us and I looked behind us to see who it was." It was Sampson (Tr. 630). Young noticed Sampson get into a black Buick car parked near the restaurant which was occupied by two other people (Tr. 631). Young and Brown went to Brown's car, and Brown drove off alone in it. Ten or fifteen minutes later Young heard of Brown's death and, because he had been with him so recently, called the police (Tr. 644–645, 650–651).

[5] Each of the statements was admitted into evidence only against the defendant who made it, with the names of the other two defendants omitted (Tr. 461–464, 473, 815–816, 846).

[6] The grand jury indicted Harrison for the March 18 housebreaking on April 19, 1960. District Court Criminal No. 364–60. This indictment was dismissed on November 29, 1960, after Harrison's first conviction in the murder case.

(Tr. 276, 477, 485–486, 1473, 1487–1488). Sampson and White confronted Harrison, who gave Daly an oral statement telling his part in the crime (Tr. 486–494). Daly, Sampson and White then left the jail (Tr. 494). Sampson and White were taken before the Commissioner between 9:00 and 10:00 a.m. (Tr. 1036). Daly returned to the jail at 9:30 a.m. and requested to see Harrison again. Harrison signed a second form consenting to see Daly, and thereupon gave him a signed written statement. (Tr. 494–499). In this statement he stated that he Sampson, and White, planning to rob Brown, followed him in the Buick from Keys Restaurant to his home. Sampson remained in the car while Harrison, carrying the shotgun, and White went to Brown's door. Harrison knocked. Brown delayed in answering. When he came to the door he opened it half way. "I asked him for some name, * * * and he said no, nobody lives here by that name. Orson turned and started down the steps, then I raised the shotgun up from under my coat and [Brown] slammed the door and the glass hit the barrel of the gun and the gun went off" (Tr. 511).[7] Harrison and White ran, Sampson picked them up in the car, they stayed together for some time and then dispersed (Tr. 507–514). After taking Harrison's statement Daly left the jail at 11:30 a.m. (Tr. 495).[8]

White's and Harrison's testimony before the jury about the crime

White and Harrison testified before the jury about the crime.

(a) White admitted driving with Sampson and Harrison to 4th and R Streets, N.W. (Tr. 968). He admitted that he was

[7] Benjamin Valentine testified that in March 1960, after Brown's death, he had a conversation with Harrison at R. C's Restaurant (Tr. 205–207). Harrison "told me that he was the one that had killed * * * Brown * * * He told me that he walked up to the door and knocked on the door and he had a shotgun under his trenchcoat, and * * * Brown opened the door and he said something to Brown" who "went inside of his coat for something, like he might have been going for a gun or something." Valentine testified that his conversation with Harrison was interrupted at this point and was not continued (Tr. 209–210).

[8] Harrison's statements were admitted into evidence against Harrison only (Tr. 507).

Harrison, White and Sampson each alleged that his confessions were involuntary. (Tr. 1230 *et seq.*, 989, 1325–1329.)

with Harrison at Brown's house, that he heard an "explosion," that he ran, and that he drove away with Harrison and Sampson (Tr. 969–970, 974–980). He denied an intent to rob (Tr. 988). He admitted convictions for larceny from an interstate shipment, petty larceny and unlawful entry (Tr. 1005).

(b) Harrison admitted driving with Sampson and White to 4th and R Streets (Tr. 1336). He said he took the gun to Brown's house to pawn it with Brown (Tr. 1339). "When [Brown] came to the door he pushed the shade and curtain back and looked out of the door. Then he pulled the door open and he saw me and asked me did I have anything for him. I told him yes. He said, 'Let me see it, come on in.' So, I had the shotgun in my hand * * *. I picked it up to let him see and was coming in, and he pushed the door in my face and the glass of the door hit the gun and the gun went off" (Tr. 1337). He ran, and "almost ran into White on the steps" (Tr. 1338).

As stated, the jury convicted Harrison, White and Sampson of felony-murder.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

SUMMARY OF ARGUMENT

I

a. Appellant Harrison was an adult, lawfully detained in an adult jail to answer for a crime committed when he was an

adult, when he consented to see the police at the jail and confessed to them that he had murdered George Brown in the course of attempting to commit a robbery, a few days before he became 18. The *Harling* case does not bar use of this confession in District Court. Harrison did not give the confession in the non-criminal, non-punitive, *parens patriae* setting of juvenile proceedings but as an adult, lawfully committed to an adult jail in an adult proceeding to answer for an adult crime. Since the statement was not obtained by any use or misuse of juvenile court processes, it is admissible.

b. White's confession came immediately upon his being confronted with the accusatory statement of a co-defendant. It came within a reasonable time after his arrest and was not preceded by interrogation. It is therefore not barred by the Mallory Rule.

c. In view of the length of the interrogation that preceded the incriminating statements which Sampson gave on the night of March 20, 1960, for which under the decisions of this Court there was insufficient justification on the record, it seems clear that the statements are inadmissible.

II

The recent case of *Pea* v. *United States*, D.C. Cir., No. 17,824, decided October 10, 1963, settles the double jeopardy issue raised by appellants. The record is not presently sufficiently complete to permit resolution of the speedy trial issue.

III

The trial judge gave appellants a fair trial. The record shows that he dealt fairly with all counsel, and that his rulings were accurate and justified. The charge to the jury was accurate and fair, and there was no objection to it. The record also shows that the trial judge did not abuse his discretion in authorizing the Marshals to put two of the appellants in restraint during the trial.

ARGUMENT

I. The confessions of Harrison and White were admissible

A. Harrison's confession

Appellant Harrison killed George Brown a few days before Harrison became eighteen. After reaching eighteen, Harrison was arrested as an adult and charged with a housebreaking which occurred when he was an adult. He was thereupon brought before the Municipal Court and committed to jail to await the action of the grand jury on the housebreaking charge. See counterstatement, *supra*.[9] While he was in jail, under lawful detention, charged as an adult with an adult crime, he consented to see the police and told them at the jail of how he came to kill Brown. In *United States* v. *Carignan*, 342 U.S. 36 (1951), an adult defendant lawfully committed to jail for one crime was questioned about another and gave statements about it. The Supreme Court held that the statements thus obtained were admissible if voluntary. *Carignan* is factually and legally indistinguishable from this case. Its holding makes it perfectly clear that, in the present case, the police lawfully talked to Harrison and that his statements were properly admitted into evidence at trial. See also *Morgan* v. *United States*, 111 U.S. App. D.C. 127, 294 F. 2d 911 (1961).

Harrison says, however, that because he committed murder ten days before he became 18, the confession that he did so, which he gave when he was an adult lawfully committed to jail, was inadmissible against him at his trial in the District Court. He relies on the *Harling* case to support this proposition.[10] But *Harling*, unlike the present case, involved a 17-year-old whose statements were given after he was committed to the custody of juvenile authorities. *Harling* holds only that it would offend principles of fundamental fairness to allow admissions made by the child in the non-criminal, non-punitive, *parens patriae* setting of juvenile proceedings to be used later for the purpose of securing conviction and punishment in an adult prosecution. That is not what happened here. The present

[9] The grand jury subsequently indicted him for the housebreaking. District Court Criminal No. 364-60.

[10] *Harling* v. *United States*, 111 U.S. App. D.C. 174, 295 F. 2d 161 (1961).

case is not a case where the juvenile court processes were used or misused to obtain evidence for adult proceedings. Harrison was not a child when he gave the statements. He did not give them in the non-criminal, non-punitive, *parens patriae* setting of juvenile proceedings but as an adult, lawfully committed to an adult jail in an adult proceeding to answer for an adult crime.[11] Only the most superficial and inaccurate reading of *Harling* would insulate Harrison from use in the District Court of his statements given in the circumstances of this case.

The relevance and probative value of Harrison's statements with regard to the issue of his guilt are obvious. No valid reason can be asserted to justify action which would deprive the jury of the opportunity to hear such evidence. Exclusion of Harrison's statements would do nothing to preserve the sanctity of juvenile proceedings; it would not be relevant to the discouragement of police misconduct; it would not be predicated upon the importance of guarding a legally or constitutionally protected right. "Any claim for the exclusion of evidence logically relevant is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." *Nardone v. United States*, 308 U.S. 338, 340 (1939). Harrison's application to have his statements excluded does not meet this test.[12]

B. White's confession

Officer Pixton arrested White at his home at 7:30 p.m. on Sunday, March 20, 1960. (Tr. 711, 729.) He arrived with White at police headquarters at 8:00 p.m. (Tr. 711, 828). According to Pixton no one talked to White until about 9:45 p.m. when Lt. Daly spoke to him for a very few minutes, telling him that he was implicated by Sampson (Tr. 686–688, 711–

[11] The Juvenile Court had the power to waive the case to District Court for trial, which it subsequently did (Tr. 500), but neither the Juvenile Court, nor the fact that Harrison killed Brown before he became 18, could institute a *parens patriae* relationship at the jail where none existed.

[12] Appellee's argument is not, as Harrison says, that because Harrison was seventeen when he killed Brown and eighteen when he admitted it he is entitled to the protections of neither *Mallory* nor *Harling*. On the contrary, the point is that Harrison's rights under neither case were abused. He gave his statements while he was legally detained at the jail as an adult, and they were not the product of exploitation of juvenile proceedings.

712, 733–736). Pixton, at Daly's direction, then began to take White's statement. He advised White of his rights and, beginning at 10:00 p.m., White told of his involvement in the crime (Tr. 687–688, 691, 714). This confession was reduced to writing between 10:30 and 11:45 p.m. (Tr. 692, 715). White was taken before the Commissioner the next morning before 10:00 a.m. (Tr. 1036).

The circumstances under which White gave his confession do not, as White contends, make it inadmissible under the *Mallory* rule. White was not questioned at the homicide squad from the time he arrived at 8:00 p.m. until 9:45 p.m. when he was confronted by Lt. Daly with Sampson's statement implicating him. For an hour of that time (8–9:00 p.m.) Daly was putting into writing Sampson's statement implicating White with which Daly confronted White at 9:45 p.m. (Tr. 425–431). See *Goldsmith* v. *United States*, 107 U.S. App. D.C. 305, 312, 277 F. 2d 335, 342 (1960), *cert. denied*, 364 U.S. 863. As soon as he was confronted by Lt. Daly with the fact of his implication in the crime he readily admitted his involvement to Officer Pixton, who informed White of his rights before he confessed.[13] There was no prolonged or intensive police interrogation of White between his arrest and confession, nothing "even remotely resembling grilling." *Goldsmith* v. *United States*, *supra*, 107 U.S. App. D.C. at 314, 277 F. 2d at 344. Indeed there was virtually no interrogation at all. A confession voluntarily given upon an initial accusation or upon confrontation with incriminating evidence is admissible, and may be reduced to writing. *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 250 F. 2d 30 (1957); *Milton Mallory* v. *United States*, 104 U.S. App. D.C.

[13] Lt. Daly testified that White was brought to the homicide squad office about 6:30 p.m., and that he talked to White briefly at least once before he confronted him, around 10:00 p.m., with the fact that Sampson had implicated him (Tr. 264, 267, 268–270, 272–273, 792). But there is also the testimony, cited above, given by the officer who arrested White, that White arrived at the office at 8:00 p.m. and confessed spontaneously at 10:00 p.m. "The evidence therefore supports the judge's ruling." *Leon Jackson* v. *United States*, 114 U.S. App. D.C. 181, 185, 313 F. 2d 572, 576 (1962).

66, 259 F. 2d 796 (1958); *Tony Coleman* v. *United States*, —— U.S. App. D.C. ——, 317 F. 2d 891 (1963); *Trilling* v. *United States*, 104 U.S. App. D.C. 159, 260 F. 2d 677 (1958). And, with a single exception, this Court has never held inadmissible a confession begun, as this one was, within 2½ hours of arrest, much less one preceded by virtually no interrogation. Compare *Charles Coleman* v. *United States*, 114 U.S. App. D.C. 185, 313 F. 2d 576 (1962).

Thus, the record shows that the trial judge properly admitted White's statement.[14]

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[14] White makes three other arguments relating to his confession. (1) He says the confession was not sufficiently corroborated. But Brown's violent death is itself sufficient corroboration of White's confession that he was at Brown's house when the gun was fired there and that his intent was to participate with Harrison and Sampson in robbing Brown. Also, the coroner testified that the pellets from the shotgun hit Brown's face approximately horizontally, indicating that, whether Harrison deliberately pulled the trigger or the gun exploded when the door struck it, Harrison raised it to menace Brown. Further, Brown was found with a large roll of money on his person. Mrs. McCoy saw two males running from the scene, one hiding a gun under his coat. Evans testified that he loaned his Buick to Harrison the night before the crime when White and Sampson were present, and this corroborated White's confession that they went to and fled from the scene of the crime in Evans' Buick. See counterstatement. Thus, White's confession as to the crime, his presence at the scene, and his frustrated intent to participate in robbing Brown were overwhelmingly corroborated. *Smith* v. *United States*, 348 U.S. 147 (1954); *Opper* v. *United States*, 348 U.S. 84 (1954); *Wong Sun* v. *United States*, 371 U.S. 471, 489, n. 15 (1963). (2) White says that the government was bound by his confession, which he says entitled him to judgment of acquittal on the ground of abandonment. The government was not so bound. *Epps* v. *United States*, 81 U.S. App. D.C. 244, 157 F. 2d 11 (1946). Further, it was for the jury to decide whether the confession and other evidence proved that White "had wholly and effectively detached himself from the criminal enterprise before the [felony-murder was] in the process of consummation or [had] become so inevitable that it [could not] reasonably be stayed." *Mumforde* v. *United States*, 76 U.S. App. D.C. 107, 109, 130 F. 2d 411, 413 (1942). It is to be noted that by his own admission he made only a verbal effort to stay the crime (Tr. 821). And White is in no position to hold the government to his confession when he himself abandoned it on the stand (Tr. 988). (3) White says the judge's instruction on abandonment was plain error. It was given twice to the jury without objection (Tr. 1683, 1703). It is in terms approved in *Mumforde* v. *United States*, *supra*. And the use of the word "repent" in the instruction, to which White now objects, does not at all carry a connotation solely of moral repentance.

C. Sampson's confession

The record shows that Sampson was arrested at his home on March 20, 1960 (Tr. 852, 1025, 1026), that he was brought to the homicide squad around 6:00 p.m., and that he was thereafter questioned extensively prior to giving incriminating oral and written statements between 10:20 p.m. and midnight (Tr. 274–275, 412, 413, 418–419, 426–431, 464–470). In view of the length of the interrogation that preceded the incriminating statements, for which under the decisions of this Court there was insufficient justification on the record, it seems clear that the statements are inadmissible.[15]

II. Appellants' trial did not violate their double jeopardy rights

The record shows that after their first trial, which resulted in death sentences for all of them, appellants personally signed notices of appeal. When it was discovered that two of the three appellants had been represented at trial by the imposter Morgan, this Court gave them permission to move for a new trial in the District Court, which they refused to do. The appeal was therefore reinstated and this Court, over appellants' objections, ordered a new trial. Appellants contend that this Court's action in awarding a new trial contravened the 5th Amendment.

The order awarding a new trial itself constituted a judgment of this Court overruling appellants' argument. And this Court's recent decision affirming the conviction in *Pea* v. *United States*, No. 17,824, decided October 10, 1963, settles the issue. Pea, who had also been represented by Morgan and sentenced to death, and who had instituted an appeal, eschewed opportunities for a new trial offered by this Court and the District Court, as did appellants here. After his second trial, which this Court ordered, Pea appealed on the ground, *inter alia*, that the second trial violated the double jeopardy clause. In

[15] In view of what has been said above, it is unnecessary to answer Sampson's other contentions, except those which challenge the indictment, as to which see Argument II, *infra*. It is to be noted, however, that the issues raised by Sampson are the same issues that White and Harrison raise, and this brief therefore deals with them.

affirming his conviction this Court perforce decided that it did not. (See briefs of the parties, esp. government's brief pp. 4–7. It is to be noted that Morgan signed Pea's notice of appeal after his first trial. Pea merely signed an affidavit of indigency. Appellants here signed their own notices of appeal.)[16]

III. The trial judge gave appellants a fair trial

Appellants juxtapose several isolated passages from the 1700 page record of a 13 day trial, and allege that these passages establish that the trial judge dealt unfairly with defense counsel and thereby deprived them of a fair trial. In passing upon this serious charge the Court is urged to review the full record. It is submitted that the full record shows that the judge dealt fairly with all counsel, and that his rulings were, with few exceptions, accurate and justified. See, for example, Harrison's statement at the end of the footnote on page 31 of his brief, which cites the Court to various pages of the record: "It is not contended that the rulings, interruptions, comments, etc., on these pages were all erroneous or without provocation." And White states (Br. 16): "Defense counsel for Appellant White did not receive unfair treatment by the Lower Court." The Court should also note the provocative conduct of Sampson's counsel, and the gratuitous delays caused by him, in and out of the presence of the jury. (Tr. 51, 52, 92, 109, 182–183, 185, 202–204, 259–260, 357, 398, 454–455, 562, 577, 583, 606, 617–620, 625, 654, 660, 676, 719–723, 726, 981–985, 1039, 1044–1045, 1060–1061, 1069, 1082–1083, 1092–1093, 1125–1126, 1152, 1215, 1227, 1431–1432, 1441, 1446, 1469.) With respect to the charge that the judge favored the prosecutor the Court should

[16] Appellants seek dismissal of their indictment on speedy trial as well as double jeopardy grounds. The record as to this issue is not complete. (Even as the record now stands, appellee submits that appellants' contentions on the issue are without merit.) The date of trial was continued four times after this Court ordered a new trial. Appellants have not had the continuance proceedings before the Chief Judge of the District Court transcribed. Appellee respectfully submits that the issue is therefore not presently in a posture where this Court would wish to rule on it. *Wade* v. *United States*, 104 U.S. App. D.C. 135, 259 F. 2d 950 (1958). Appellee has undertaken to have the continuance proceedings transcribed, and with the Court's permission will file a supplement to its brief on the speedy trial issue when the transcripts have been prepared.

note the numerous times, in and out of the presence of the jury, that the judge sustained defense objections, including objections to argumentative questions (Tr. 1197–1198, 1266, 1281, 1285, 1354), and overruled the prosecutor's objections, and criticized erroneous conduct of the prosecutor. (Tr. 102, 103, 112, 114–115, 135, 142, 143, 168, 173, 216–217, 242–243, 344–345, 415–417, 487, 576, 643–644, 658, 894, 997, 1051–1052, 1228, 1270, 1346, 1381.)

The charge to the jury was accurate and fair. It included a lengthy admonition to the jury to ignore discussion and remarks between court and counsel. (Tr. 661–662). Compare *Peckham* v. *United States*, 93 U.S. App. D.C. 136, n. 14, 210 F. 2d 693, n. 14 (1953). Defense counsel made no objection to the charge whatsoever, and also made no objection to the court's post-charge dealings with the jury. (Tr. 1695, 1702).[17]

[17] White, together with Sampson, complains of the circumstances in which he was put in waist-chains and handcuffs during the trial. As the cases cited by appellants show, a defendant is entitled to be present in a courtroom free from restraints, but the court may in its discretion order him put under restraint "where the character of the accused and the danger of escape or disorder make a different course necessary." *Blaine* v. *United States*, 78 U.S. App. D.C. 64, 136 F. 2d 284 (1943). In the present case, on the third day of trial, the court reported to counsel that it "was informed by the Deputy Marshal in charge that while the defendants were in the holding cell adjacent to the courtroom, during the recess the defendant White and the defendant Sampson assaulted two of the Deputy Marshals, that the defendant White hit the Deputy Marshal several times and broke his glasses * * * And the defendant Sampson likewise assaulted another one of the Deputy Marshals. The Court has authorized the Marshals to use such measures as handcuffs or leg irons, or both, as they deem necessary, in order to prevent a repetition of that sort of thing." It is not disputed that the imposition of restraint is an appropriate response to such conduct. The Court did not, as Sampson suggests, delegate his authority in this matter to the Marshals. He made it clear that the restraints were imposed on his authority as a result of the assault, and the Marshals had discretion to determine only the necessary degree of restraint. (Tr. 320, 525–526, 954.) Nor can it be said to have been an abuse of discretion for the court to accept the statement of the Marshal and reject the proffer of White and Sampson that, in effect, the Marshals and not the defendants were the attackers. (Tr. 524.) Finally, there was no request for an instruction to the jury not to be affected by the presence of restraints on the two defendants. Sampson requested only that the court make an irrelevant query, i.e., whether the jury would be prejudiced by seeing the restraints. (Tr. 572–573.)

CONCLUSION

Wherefore, it is respectfully submitted that, as to Sampson, the case should be remanded for a new trial, and as to Harrison and White, the judgment of the District Court should be affirmed.

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U.S. GOVERNMENT PRINTING OFFICE: 194

APPELLANT'S REPLY TO SUPPLEMENT TO APPELLEE'S BRIEF

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDDIE M. HARRISON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 17,991

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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December 17, 1963

APPELLANT'S REPLY TO SUPPLEMENT TO APPELLEE'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDDIE M. HARRISON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	)	No. 17,991

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The appellant Harrison's brief of September 16, 1963, contends that he was deprived of the speedy trial guaranteed him by the Sixth Amendment to the Constitution because there was a 21-month delay between the time when this Court first decided a new trial was warranted (July 21, 1961) and the time when the trial actually began (April 22, 1963).

On December 16, 1963, the Government filed a "Supplement to Appellee's Brief" in which it is contended

(1) that the appellants failure to receive a second trial promptly was their own fault because they failed to ask for a second trial, and

(2) that "appellants caused most of the delay, or acquiesced in it, or were not ready for trial when the continuances occurred." (Supplement to Appellee's Brief, p. 5).

These contentions are without merit for the following reasons:

1. The first delay of almost 11 months occurred between July 21, 1961, when this Court made it clear that the appellant was entitled to a new trial if he wanted one, and June 12, 1962, when the original District Court judgment was finally vacated and a new trial was ordered over the appellant Harrison's objection. The Government seeks to excuse this delay by saying:

> "The record shows that appellants would have received new trials in the fall of 1961, about a year after their first trial, had not they themselves refused to ask for them. It then took time for this Court to reinstate the appeals and to order, in June 1962, that appellants be given new trials." (Supplement to Appellee's Brief, p. 5).

The first sentence of the Government's statement is probably true. One can only speculate as to that. However, one can certainly challenge the Government's right to make such an

assertion confidently since the Government in the summer of 1961 was opposing grant of a new trial to the appellant Harrison.

In any event, as pointed out in the appellant Harrison's first brief, at the time in question the appellant Harrison could scarcely have been expected to request a new trial because he was vigorously insisting that a new trial was barred by the double jeopardy clause of the Fifth Amendment to the Constitution. As this Court has pointed out, failure to request a speedy trial in such circumstances is not to be held against the defendant. Mann v. United States, 113 U.S. App. D.C. 27, 29, n.2, 304 F.2d 394, 396, n.2 (1962); cf. Jordon v. United States, 352 U.S. 904, reversing 98 U.S. App. D.C. 160, 233 F.2d 362 (1956); King v. United States, 105 U.S. App. D.C. 193, 265 F.2d 567 (1959); Askins v. United States, 102 U S. App. D.C. 198, 251 F.2d 909 (1958).

The appellant agrees with the second sentence of the Government's statement to the effect that the principal delay was the time it took for this Court to order that the appellants be given new trials. However, the appellant by no means concedes the implication in the Government's brief that delay in this Court's actions are to be excluded in determining whether the appellant was denied a speedy trial. The fact that delay is attributable to a court rather than

the prosecutor is of no particular moment. See King v. United States, 105 U.S. App. D.C. 193, 196, 265 F.2d 567, 570 (1959). As the dissent in that case points out:

> "The right to a speedy trial guaranteed by that amendment means a trial without 'delays manufactured by the ministers of justice.' Black, Constitutional Law 6 266, quoted in United States v. Provoo, 17 F.R.D. 183, 197 (D.C.D.Md. 1955), affirmed 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761 (1955). The amendment was intended not only to prevent delays manufactured by the prosecutor, but to require 'the judicial tribunals to proceed with reasonable dispatch in the trial of criminal prosecutions.' Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947)." (105 U.S. App. D.C. at 199, 265 F.2d at 573).

2. The Government's contention that the appellants were responsible for most of the delay after the new trial was ordered is not supported by the record. While the Supplement to the Government's brief lists on pages 2 through 4 some 27 items that supposedly show the delays were the appellants' fault, analysis of these items shows that most of them have nothing to do with the delay and that, with minor exception, the delays were not caused by the appellants.

a. The first delay (item 1 in the Government's tabulation on page 2 of the Supplement to its brief) was one of four months from June 12, 1962, when this Court vacated the original District Court judgment and ordered a new trial,

until October 17, 1962, which was the first trial date set.[1] The Government does not, and cannot, contend that this four-month delay was attributable to the appellant Harrison in any way.

b. The next delay (item 7 in the Government's tabulation on page 3 of the Supplement to its brief) is an unexplained continuance of the trial date from October 17, 1962, to January 23, 1963. As the Government notes, there is no transcript of that continuance. However, without any transcript we know that the appellant Harrison could not have been responsible for the delay. On October 16, 1962, he was in the D.C. Jail without a lawyer. As the Government points out, in its item 10, Harrison's counsel was not appointed until October 30, 1962.[2]

1/ The Government's tabulation actually begins with July 19, 1962, which was the date on which the trial was originally set for October 17, 1962. This improperly excludes the month delay before the District Court acted on this Court's order of June 12, 1962, remanding the case to the District Court for a new trial.

2/ While the Government admits that Harrison was without counsel on the first trial date, it also seems to imply that he was represented by Mr. Halper at that time. Supplement to Appellee's Brief, p. 5. While it is true that Mr. Halper had been appointed to represent the appellant Harrison at an earlier stage of this proceeding, he clearly did not represent him on October 17, 1962. This Court's file No. 16391 shows that on March 14, 1962, Mr. Halper moved for leave to withdraw as counsel for appellant Harrison on the ground that he was physically unable to render efficient and adequate representation and this motion was granted on March 16, 1962. That file also reveals that a second lawyer appointed to represent Harrison at that time was also subsequently relieved. Finally, this Court's order of May 17, 1962, specifically recited that the appellant Harrison was not represented by counsel.

c. The next delay came on January 17, 1963, when the appellant Harrison's appointed counsel sought a 30-day continuance because, as he alleged, he had been unable to obtain a transcript of the first trial. Whether delay in furnishing needed transcript in a forma pauperis case is properly attributable to the prisoner is at least questionable. But even if it is, this was only one month out of the ten months involved between the time this Court ordered a new trial and the time when that trial was actually held.

d. The next delay (item 22 in the Government's tabulation) came on February 27, 1963. On that day the Chief Judge sent a letter to the clerk advising that he was relieving Harrison's appointed counsel due to the press of private business and continuing the trial three weeks, from March 18 to April 8. This delay wasn't the prosecutor's fault, but neither was it the appellant's since it stemmed solely from the Court's relieving an appointed counsel due to the press of his private business.

e. The final delay, as the Government admits, was occasioned by the imminence of the Court's Easter recess. The case was set for April 8, Easter was April 14, and the continuance was from April 8 to April 22, 1963.

* * *

In sum then, the record shows 314 days of delay after this Court ordered a new trial. The appellant contends that he was responsible for none of that delay and the most the Government can contend is that difficulties of his court-appointed counsel may be said to have caused 54 days of that delay.

This 314-day delay plus the original delay in issuing the order for a new trial came to a total delay of 21 months between the time this Court decided a new trial was warranted and the time the trial was actually held. Added to the year required for the first trial and the time for this appeal the appellant Harrison has now been in prison three years and eight months to the day. He has long since been deprived of the speedy trial guaranteed him by the Constitution.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

1963

Nos. 17,991
17,992
17,993

Nathan J. Paulson
CLERK

EDDIE M. HARRISON,
ORSON G. WHITE,
JOSEPH R. SAMPSON, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

SUPPLEMENT TO APPELLEE'S BRIEF

Appellants were not denied their right to a speedy trial.

Appellants' contention that they were denied their right to a speedy trial is without merit. The record shows the following: The crime occurred in March 1960. The first trial took place in October 1960. The jury found appellants guilty. New trial motions were argued in January and February 1961, and denied in March 1961, and appellants were sentenced to death on April 21, 1961. Appellants filed notices of appeal on the same day. Thereafter, the imposter Morgan was unmasked and this Court, on July 21, 1961, remanded the case to the District Court to permit appellants to move for a new trial. Appellants filed new trial motions on September 14, 1961, and were permitted by the District Court to withdraw them on October 4, 1961. This Court reinstated the appeals on January 26, 1962, and on June 12, 1962, it vacated the convictions and ordered new trials for appellants. Thereafter, the following occurred:

1. July 19, 1962: Trial set for October 17, 1962.

2. August 3, 1962: Motion of Mr. O'Donoghue, counsel for White, to withdraw, granted.

3. August 8, 1962: Mr. Atkinson appointed for White.

4. August 8, 1962: Motion of Mr. Singer, counsel for Sampson, to withdraw, granted.

5. October 5, 1962: Sampson (by [retained] counsel Mr. Stempil) files motion to dismiss indictment on ground of double jeopardy.

6. October 12, 1962: Sampson's motion to dismiss the indictment heard, argued, and denied. The transcript of this hearing, which is in the record on appeal, at page 10 shows that counsel for Sampson did not wish to proceed to trial on the upcoming trial date of October 17 and desired a continuance.[1]

1/ MR. STEMPIL: Your Honor, there is the case set for the 17th. Since I am going to appeal from your decision, can that date be set aside?

THE COURT: No, my order is not appealable; it is an interlocutory order. You can bring it up for review if there is a new trial and there is another conviction. Then, on appeal from the conviction, you can bring up my order for review. My order is not appealable at this time.

MR. STEMPIL: Then may I ask the Court to set another date for the trial so that I can do some more research on this?

THE COURT: No, if you need a continuance, you will have to apply to the Assignment Judge.

MR. STEMPIL: It's October 17th.

THE COURT: I have no jurisdiction to grant continuances. That can only be done by the Assignment Judge.

MR. STEMPIL: All right.

7. October 16, 1962: Trial date continued from October 17, 1962, to January 23, 1963. No official reason for continuance appears in the record, but see item 6 and n. 1, supra. See also items 8, 10, 11, 14.

8. October 18, 1962: Sampson filed motion for rehearing on denial of motion to dismiss the indictment.

9. October 23, 1962: Sampson's motion for rehearing denied.

10. October 30, 1962: Mr. David appointed for Harrison.

11. November 23, 1962: Motion of Mr. Atkinson, White's counsel, for leave to withdraw.

12. November 30, 1962: Mr. Atkinson's motion to withdraw heard and denied.

13. January 17, 1963: Harrison files motion for 30 day continuance to give counsel (Mr. David) time for study of transcript of first trial.

14. January 18, 1963: Case continued from January 23, 1963 to March 18, 1963. The case card states that the case was continued at "Mr. David's request--he has to read transcript." The transcript of the continance proceedings on this date (supplemental record on appeal) shows that Mr. David had been unable to read the transcript of the first trial because counsel for Sampson had it. Counsel for Sampson did not object to the continuance. Counsel for White affirmatively agreed to the continuance date (Tr. 4). He again moved to withdraw because of White's "hostility." The motion to withdraw was denied. (Tr. 4-5).

15. January 30, 1963: Harrison files motion for discharge of Mr. David and for appointment of other counsel.

16. February 5, 1963: Sampson, by counsel, files motion for dismissal of the indictment on ground of double jeopardy.

17. February 8, 1963: Harrison's motion for discharge of Mr. David argued and granted. Mr. Wood appointed to represent Harrison.

18. February 13, 1963: Government's opposition to Sampson's motion to dismiss indictment of February 5, 1963.

19. February 15, 1963: Sampson's motion to dismiss indictment argued and submitted.

20. February 18, 1963: Sampson, by counsel, files further memorandum on motion to dismiss indictment.

21. February 19, 1963: Sampson's motion to dismiss indictment denied.

22. February 27, 1963: Trial date continued from March 18, 1963 to April 8, 1963. "Mr. Wood [counsel for Harrison] given leave to withdraw and other counsel has to be appointed."

23. March 5, 1963: Mr. Thomas appointed for Harrison.

24. March 29, 1963: Harrison, by counsel, files motion to dismiss indictment on ground of double jeopardy.

25. April 4, 1963: White, by counsel, files motion to dismiss indictment on ground of double jeopardy.

26. April 5, 1963: Motions of Harrison and White to dismiss indictment heard and denied.

27. April 5, 1963: Trial date continued from April 8 to April 22, 1963. The transcript of this proceeding (supplemental record on appeal) suggests that the case was continued because of the imminence of the Easter recess.

28. April 22, 1963: Trial commenced.

The record shows that appellants would have received new trials in the fall of 1961, about a year after their first trial, had not they themselved refused to ask for them. It then took time for this Court to reinstate the appeals and to order, in June 1962, that appellants be given new trials. Trial was set for October 17, 1962. Thereafter the trial was continued to January 23, March 15, April 5, and April 22, 1963, when it took place. The record shows that appellants caused most of the delay, or acquiesced in it, or were not ready for trial when the continuances occurred. The prosecution caused none of the delay. Only Sampson ever raised the speedy trial issue prior to this appeal. None of the defendants allege trial prejudice by reason of the delay. There is no basis for appellants assertions that they are entitled to dismissal of their indictments for lack of a speedy trial. King v. United States, 105 U.S. App. D.C. 193, 265 F.2d 567 (1959); Porter v. United States, 106 U.S. App. D.C. 150, F.2d 453 (1959); Willis v. United States, 106 U.S. App. D.C. 211, 271 F.2d 477 (1959); James v. United States, 104 U.S. App. D.C. 263 F.2d 381 (1958), Walker v. United States, C.A.D.C., No. 17,897, November 14, 1963.

The record analyzed in detail shows the following:

1. As to Harrison: Harrison was without counsel on the first trial date, October 17 (item 10).[2/] His counsel was not prepared for trial

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2/ Harrison complains that counsel was not appointed for him until October 30, 1962. But Mr. Halper, who had been appointed for him in the District Court on May 31, 1961 (see docket entries), never withdrew, as did counsel for Sampson and White appointed on the same day (items 2 and 4), and was still counsel of record when Mr. David was appointed for Harrison on October 30, 1962. Moreover, there is no record that Harrison ever sought new counsel, and after Mr. David was appointed for him he had him relieved of his appointment (item 1[illegible].

Harrison and White never moved for dismissal for lack of a speedy trial or demanded a speedy trial. Sampson filed a petition for a writ of habeas corpus, alleging inter alia, lack of speedy trial, on January 25, 1963 (H.C. 41-63), but there is nothing in the record to show that he alleged lack of speedy trial in any other fashion, or that he resisted any continuance on that or any other ground, until April 5, 1963, 17 days before trial. On April 5 his counsel told Chief Judge McGuire: "I suppose the Court is cognizant of the fact that I filed motions[3] in this Court and also in the Court of Appeals[4] for a summary judgment or dismissal on the grounds of lack of a speedy trial."[5] (Emphasis supplied.) Moreover Sampson never sought a severence to enable him to be tried before Harrison and White. Indeed, on April 5 when he raised the speedy trial issue in the continuance proceedings conducted on that date he affirmatively showed that he did not seek a severance.[6] Furthermore, Sampson, like Harrison and White who also did not seek severance, was not entitled to a severance on speedy trial or any other ground . See Dykes v. United States, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962).

3/ Undoubtedly a reference to the habeas corpus petition.

4/ Sampson sought and this Court denied summary reversal of the denial of the habeas corpus petition (No. 17,707).

5/ Transcript of continuance proceedings of April 5, p. 7.

6/ The Court: Do you want to try it today? You want a speedy trial. We will start today.

Counsel for Sampson: There are two other defendants. I cannot speak for them. (Transcript of continuance proceedings of April 5, p. 7.

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Respectfully submitted,

/s/ DAVID C. ACHESON
DAVID C. ACHESON,
United States Attorney.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney.

/s/ WILLIAM H. WILLCOX
WILLIAM H. WILLCOX,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of December, 1963, sent a copy of the supplemental brief for appellee in the above entitled case by official United States mail to the attorneys for appellants addressed as follows:

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Assistant United States Attorney,
Attorney for Appellee.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,992

ORSON G. WHITE, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLANT

APPEAL FROM VERDICT AND JUDGMENT IN
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Thomas H. Wall
Ronald N. Cobert
Attorneys for Appellant
(By appointment of this Court)

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

September 16, 1963

STATEMENT OF QUESTIONS

The questions presented are:

1. Whether the trial court erred in refusing to grant a motion for a judgment of acquittal on the basis that the independent evidence introduced by the Government did not corroborate the extra-judicial statements of the accused.

2. Whether the trial court committed prejudicial error in rebuking and downgrading defense counsel.

3. Whether the trial court prejudicially erred in permitting the accused to appear before the jury in waist chains and handcuffs.

4. Whether the trial court prejudicially erred in admitting into evidence the extra-judicial statements of the accused on March 20, 1960, on the basis that such statements were obtained in violation of the Federal Rules of Criminal Procedure.

5. Whether the trial court erred in not directing a judgment of acquittal on the basis that the Government was bound by and had accepted the defense of abandonment.

6. Whether Appellant has been denied his constitutional right to a speedy trial.

7. Whether the trial court prejudicially erred in the instruction to the jury regarding abandonment.

8. Whether the trial court erred in refusing to dismiss the indictment on the ground of double jeopardy.

BRIEF FOR APPELLANT

No. 17,992

ORSON G. WHITE, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Thomas H. Wall
Ronald N. Cobert
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(By appointment of this Court)

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

September 16, 1963

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JURISDICTIONAL STATEMENT

This is an appeal from a verdict of guilty and from judgment rendered on such verdict. Appellant was indicted for the crime of first degree murder, Title 22, Section 2401 of the D. C. Code.

The Lower Tribunal had jurisdiction by virtue of Title 11, Sec. 322 of the D. C. Code, giving said Lower Tribunal jurisdiction to try all crimes and misdemeanors committed in the District of Columbia and the jurisdiction of this Court is claimed under the provisions of the Act of June 25, 1948, Ch. 646, 62 Stat. 929.

STATEMENT OF THE CASE

Procedural Background

On April 19, 1960, Orson G. White, Appellant herein, and two others, were indicted in this jurisdiction and charged with the crime of murder in the first degree in violation of Title 22, Section 2401 of the District of Columbia Code. The offense allegedly took place against the person of one George H. Brown on or about March 8, 1960, within the District of Columbia (JA). The indictment contained two counts, the first alleging deliberate and premeditated malice, and the second alleging murder in the perpetration of the crime of robbery.

On April 29, 1960, Appellant appeared before the Honorable Judge McLaughlin of the District Court and pleaded not guilty. On September 14, 1960, one "L. A. Harris", a purported attorney at law,

entered an appearance on behalf of the Appellant (JA). Appellant was brought to trial on September 26, 1960,*/ and found guilty under count two of the indictment on October 19, 1960 (JA). Appellant was sentenced to death by electrocution on April 21, 1961 (JA).

A notice of appeal was signed by Appellant and filed by his purported attorney (Tr. 6-7). During the pendency of the appeal, the office of the United States Attorney discovered that Appellant's attorney was, in fact, an imposter and not licensed to practice before the Bar (JA). Upon knowledge of these facts the Government moved for a limited remand (Tr. 7). On July 21, 1961, this Court directed the District Court to entertain a motion on a day certain to vacate judgment and award a new trial (JA). On the critical filing date counsel was appointed to file the appropriate motion for Appellant (JA). Such a motion was filed without consent of Appellant who communicated his desire not to move for a new trial (JA).

On October 4, 1961, the Honorable Judge Matthews of the District Court, upon hearing the matter, issued an order which concluded that, because of the withdrawal of the motion, the mandate of this Court could not be carried out (JA). By Order dated January 26, 1962, this Court proceeded to reinstate Appellant's appeal (JA). The appeal was not prosecuted. On June 6, 1962, this Court sua sponte vacated judgment and remanded to the District Court with directions to award a new trial (JA).

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*/ Appellant was tried with two others and all were convicted. United States v. Harrison; United States v. Sampson.

On April 4, 1963, Appellant, by his counsel, moved to dismiss the indictment on the ground of double jeopardy (JA). This motion to dismiss the indictment was heard on April 5, 1963, by the District Court and denied (JA). The case came to trial before the Honorable Judge Holtzoff on April 22, 1963. The Government abandoned prosecution on the first count and predicated its case under the murder-felony statute. The trial was concluded on May 8, 1963, the jury returning a verdict of guilty of murder in the first degree, and recommending life imprisonment (Tr. 1709).

At the conclusion of the case for the Government, counsel for Appellant moved for a judgment of acquittal which was denied (Tr. 950). This motion was renewed at the conclusion of all the evidence (Tr. 1524). Appellant filed a motion for judgment of acquittal or in the alternative for a new trial on June 5, 1963, which was denied by the District Court on June 8, 1963 (JA). Acting upon an application and affidavit in support thereof, the District Court granted Appellant leave to proceed without prepayment of costs (JA). Appellant filed a notice of appeal on June 20, 1963 (JA).

The Facts

One George "Cider" Brown sustained a gunshot wound in the face at about 9:00 a.m. on March 8, 1960, which caused his death (Tr. 122, 125). A neighbor of the deceased, upon hearing an unusual sound, saw two unidentified individuals running from the house of the deceased (Tr. 143-44, 160).

Appellant was with defendants Sampson and Harrison when the latter borrowed a black Buick sedan on the evening of March 7, 1960 (Tr. 220-26). Defendant Sampson was seen at a restaurant in proximity to the deceased on the morning of the alleged crime in the company of two unidentified individuals in what appeared to be a black Buick (Tr. 627-31).

Appellant was initially arrested in connection with the alleged crime on March 8, 1960, held for 24 hours, and released (Tr. 747, 1045). Appellant was again arrested on March 20, 1960, somewhere between 6:00 p.m. and 7:30 p.m. (Tr. 264, 685, 748). Appellant was questioned intermittently by various police officers (Tr. 268, 453, 686, 754, 830). Police Officer Pixton advised Appellant of his constitutional rights at about 10;30 p.m. (Tr. 737).

When first questioned, Appellant denied any participation in the alleged crime (Tr. 452-53). This denial came about 7:00 p.m. (Tr. 452). Shortly thereafter, Appellant was confronted with the statement of another defendant, and once again denied his involvement (Tr. 455). Finally, a confession began to be extracted at 10:30 p.m. (Tr. 692). The statement was completed at 11:45 p.m. (Tr. 715).

Interrogation terminated at about midnight, and Appellant was taken by police officers to certain premises in order to locate the alleged weapon (Tr. 738-39). No weapon being found, Appellant was returned to police headquarters, taken to the identification bureau, photographed, fingerprinted and booked at 1:30 a.m. on March 21, 1960 (Tr. 362, 740). Appellant was arraigned before the United States Commissioner between 9:00 a.m. and 10:00 a.m. on March 21, 1960 (Tr. 543).

The confession, admitted over objection, generally states that Appellant was in the company of two others who borrowed a car on the evening of March 7, 1960, looked for the deceased, found and followed him to Keys' Restaurant, parked down the street and waited, followed deceased to his house and knocked on the door several times; however, when deceased was slow in answering the door, Appellant attempted to get the other man to leave and was in fact leaving when a shotgun went off and killed the deceased at the hands of the other man (Tr. 818-25). Appellant denies that these statements were made voluntarily (Tr. 989).

Certain admissions allegedly given by Appellant during a jail interview were admitted into evidence (Tr. 888). These admissions are neither signed nor was the interviewer able to identify the one interviewed. The statement admits that a robbery was to take place, and adds that Appellant had already departed when a shot was heard (Tr. 890-91). Appellant refused to sign the statement at the time it was allegedly made (Tr. 891) and thereafter denied the contents (Tr. 927).

Appellant took the stand in his own behalf. Appellant denied that a robbery was planned in March of 1960 against the person of one George "Cider" Brown (Tr. 988).

During the course of the trial, there developed an apparent altercation between Appellant and two deputy marshals (Tr. 320). The Court authorized the use of handcuffs and leg irons (Tr. 320). Waist chains and handcuffs were used on Appellant (Tr. 725). It was advanced by one counsel that the jury had obtained information concerning the altercation, and accordingly moved for a mistrial which was denied (Tr. 365-66).

STATUTES INVOLVED

United States Constitution
Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Amendment VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Criminal Procedure state:

Rule 5(a). Appearance Before the Commissioner.
An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

District of Columbia Code states:

§ 4-140. Arrests without warrant.
. . . such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

§ 22-2401. Murder in the first degree - Purposeful killing - Killing while perpetrating certain crimes.
Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

District of Columbia Code states:

§ 22-2901 Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

§ 22-2902. Attempt to commit robbery.

Whoever attempts to commit robbery, as defined in section 22-2901, by an overt act, shall be imprisoned for not more than three years or be fined not more than five hundred dollars, or both.

STATEMENT OF POINTS

The points relied upon in this brief are:

1. That there was insufficient evidence to establish Defendant's guilt beyond a reasonable doubt and that the trial court erred in denying Appellant's motion for a judgment of acquittal and in submitting the case to the jury.

2. That the trial court committed prejudicial error in admitting into evidence extra-judicial confessions illegally obtained in contravention of the Federal Rules of Criminal Procedure and that the conviction was based on such confessions.

3. That the confessions were without required corroboration and that such confessions were the basis of conviction.

4. That the actions of the trial court in ordering restraints placed on Appellant and in frequently reprimanding counsel for defendants during the course of the trial have so prejudiced the entire trial of this cause so as to deprive Appellant of a fair and impartial trial.

5. That the delay in taking Appellant to trial violated Appellant's right to a speedy trial.

6. That the trial of Appellant constituted double jeopardy.

7. That the trial court committed prejudicial error by providing an improper instruction to the jury regarding abandonment.

SUMMARY OF ARGUMENT

I.

A criminal conviction cannot be sustained when the offense is proven solely by the uncorroborated confession or admissions of the accused. Forte v. United States, U.S. App. D.C., 94 F.2d 236 (1937). The Government must introduce substantial independent evidence which tends to establish the trustworthiness of the extra-judicial statements. Opper v. United States, 348 U.S. 84 (1954). To substantiate an intangible crime the corrobative evidence must implicate the accused. Smith v. United States, 348 U.S. 147 (1954).

The evidence of the Government tending to show that the accused was in the company of the other two defendants on the eve of the alleged crime and that two unidentified individuals were seen running from the scene of the alleged crime is not sufficiently substantial to establish the corpus delecti of attempted robbery, the trustworthiness of the extra-judicial statements or the identity of the accused.

II.

Excessive injection of the trial judge into the examination of witnesses and the judge's numerous hostile remarks to defense counsel demonstrated a lack of impartiality and disorderly atmosphere which may well have influenced the jury. Peckham v. United States, 13 U.S. App. D.C. 148, 210 F.2d 693 (1953). Repeated indications by the judge of impatience and displeasure with the defense denied the accused of a fair and impartial trial. United States v. Ah Kee Eng, 241 F.2d 157 (1957).

III.

Freedom from handcuffs, shackles, or manacles of a defendant during the trial of a criminal case is an important component of a fair and impartial trial. Way v. United States, 285 F.2d 253 (1960). The accused in the instant case was denied that right without a consideration of the incident which gave rise to the imposition of restraints. The jury must have necessarily conceived of prejudice against the accused as being in the opinion of the judge a dangerous man, and not to be trusted. This resulting attitude deprived Appellant of a fair and impartial trial.

IV.

An arrested person must be brought before a judicial officer without unnecessary delay. Rule 5(a), Federal Rules of Criminal Procedure. The accused is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt. Mallory v. United States, 354 U.S. 449 (1957).

The facts in the instant case indicate that Appellant was held and questioned intermittently for three to four hours before any attempt was made to place Appellant through any administrative steps, notwithstanding denials of the charge by the accused. The statements, obtained during the aforementioned delay, were in violation of the Mallory doctrine and inadmissible. Coleman v. United States, U.S. App. D.C. ___, 313 F.2d 576 (1962); Tatum v. United States, ___ U.S. App. D.C. ___, 313 F.2d 579 (1962).

V.

When the Government introduces confessions or admissions of the accused, then the whole of the statements is to be taken together, and the

Government is bound by them unless they are shown to be untrue by the evidence. Pratt v. State, 59 Tex. Crim. Rep. 263, 129 S.W. 364 (1906). The Government, having given credit to a defense contained in the introduced statements of the accused, is bound by that defense unless it proves otherwise. State v. Dashman, 153 Mo. 454, 55 S.W. 69 (1900). The Government in the instant case had to accept as fact that Appellant either abandoned the attempted robbery or had concluded the attempt when the homicide occurred, thus releasing Appellant from the language of the murder-felony statute.

VI.

The United States Constitution, Sixth Amendment, guarantees the accused the right of a speedy trial. A six-month delay, without fault of the accused, has been held to constitute a denial to a speedy trial. Smith v. United States, ___ U.S. App. D.C. ___, No. 17106, decided August 15, 1963. The ten-month lapse, not caused by Appellant, after the award of a new trial denied Appellant's right to a speedy trial.

VII.

The court erred by instructing the jury that Appellant had to repent before an abandonment could be realized. The instruction precluded the attitude of fear as a valid alternative cause for an abandonment. People v. Nichols, 230 N.Y. 221, 129 N.E. 883 (1921).

VIII.

The United States Constitution protects an accused from being placed twice in jeopardy for the same offense. This right guarantees against multipule prosecution and not against dual punishment. United States v. Ball, 163 U.S. 660 (1896). Appellant did not urge or seek a new trial and was thus placed in double jeopardy when the second jury was impaneled.

ARGUMENT

I.

THE EVIDENCE AGAINST APPELLANT, INDEPENDENT OF THE EXTRA-JUDICIAL STATEMENTS, IS NEITHER SUFFICIENT TO ESTABLISH THE CORPUS DELICTI NOR SUFFICIENTLY SUBSTANTIAL TO ESTABLISH THE TRUSTWORTHINESS OF THE EXTRA-JUDICIAL STATEMENTS

A criminal conviction cannot be sustained when the offense is proven solely by the uncorroborated confession or admissions of the accused. See, e.g., Yarbrough v. United States, 309 F. 2d 936 (1962). This rule of law, standing unquestioned, has been the source of interpretive problems. The difficulty lies in the sufficiency of the evidence necessary for corroboration.

This Court first considered the sufficiency question in depth in the case of Forte v. United States, 68 U.S.App.D.C. 111, 94 F.2d 236 (1937). An appeal in that case was taken from a conviction of transporting a motor vehicle in interstate commerce knowing it had been stolen. It was contended and upheld that there was lacking, independent of the confession, substantial proof of the corpus delicti.

Writing in view of the Wickersham Report[1] which noted, in part, grave misgivings on the accuracy of confessions after interrogation of relays of questioners,[2] this Court in the Forte case stated that:

1/ National Commission on Law Observance and Enforcement, Report No. 11, Lawlessness in Law Enforcement (1931).

2/ Id. at 152-54.

> . . . there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the corpus delicti and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith. 94 F. 2d at 240.

The Forte case "would require, in view of the corroboration rule, that the whole of the charge, including the criminal agency of the accused, be evidenced independently of the confession." Id. at 244. Thus, under Forte, as applied to the instant case, the Government would necessarily have to establish by substantial evidence, independent of the confessions or admissions, the whole of the charge of attempted robbery, including a knowledge of the robbery[3/] and an intent to rob.[4/]

The Supreme Court considered the corroboration rule of Forte in the case of Opper v. United States, 348 U.S. 84 (1954). This case concerned a conviction of inducing a fellow employee to accept compensation for services to be rendered in connection with a Federal contract. The Court, recognizing the corroboration rule of Forte, stated:

> However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore,

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3/ The Government theorizes that Appellant "was there to aid and abet in the carrying out of the robbery." The prosecution must, therefore, establish that Appellant had knowledge of the intent, if any, to rob. Compare, Pereira v. United States, 347 U.S. 1, 11 (1954), holding that the aider must "consciously" share in the criminal act.

4/ "Intent" is a necessary element of attempted robbery. Compare, Accardo v. United States, 249 F. 2d 519, 102 U.S. App. D.C. 4 (1957), cert. den. 356 U.S. 943 (1958).

> to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. Smith v. United States, 348 U.S. 147, 75 S.Ct. 194. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt. Id. at 93 (Emphasis added).

As noted in the body of the above quotation, the Court referenced its decision of that same day in Smith v. United States, 348 U.S. 147 (1954). In that case the Court considered a conviction of federal income tax evasion. The Court there noted that the crime of tax evasion was such that there is no tangible injury which can be isolated as a corpus delicti,[5/] as distinguished from homicide. Thus, the Court said, as to tax evasion, "it cannot be shown that the crime has been committed without identifying the accused."[6/] Id. at 154. The Court added:

> Thus we are faced with the choice either of applying the corroboration rule to this offense and according the accused even greater protection than the rule affords to a defendant in a homicide prosecution, . . . or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible corpus delicti, where the corroborative evidence must implicate the accused in order to show that a crime has been committed.

The Court in the Smith case cited this Court's decision in Forte as supporting the above quotation. The Supreme Court did not,

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5/ Corpus delicti was defined in Forte to include "not only the body or fact of the wrong ... but also the criminal means by which the same came about. 94 F.2d at 243.

6/ In the instant case the crime of attempted robbery is such that there is no tangible injury and thus, it is contended, that it was incumbent upon the Government to establish independently the identity of the accused.

therefore, based on Smith, relieve the Government of establishing the agency of the accused by substantial independent evidence in a case where tangible injury is not a part of the corpus delicti. The Court reiterated that there must be "substantial independent evidence that the offense has been committed" while adding that "one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."

A recent case in the tenth circuit, Yarbrough v. United States, 309 F. 2d 936, 937-38 (1962), held that "the prosecution, in addition to the confession or admissions, must produce substantial independent evidence of the essential elements of the crime charged which will tend to establish the trustworthiness of the statements made by the accused."

In the instant case, the Government introduced independent evidence[7/] pertaining to Appellant that Appellant had been with two other defendants on the eve of the alleged attempted robbery, that a car had been borrowed, that a similar car had been seen on the morning of the alleged crime in the possession of one defendant positively identified and finally that a neighbor of the decedent saw two unidentified individuals running from the home of decedent following a noise. This independent evidence is not substantial and neither establishes the existence of a crime nor the identity of the accused nor the essential elements of a crime which will tend to establish the trustworthiness of the statements of the accused. The Lower Tribunal erred

7/ It cannot be claimed that either the oral confession or the statement given at D. C. Jail can be used to corroborate the written confession. See, e.g., United States v. Echeles, 122 F. 2d 144 (1955).

in denying Appellant's motion for a judgment of acquittal at the conclusion of the Government's evidence.

II.

THE CONDUCT OF THE TRIAL JUDGE IN REBUKING AND DOWNGRADING DEFENSE COUNSEL HAS DEPRIVED APPELLANT OF A FAIR AND IMPARTIAL TRIAL

Defense counsel for Appellant White did not receive unfair treatment by the Lower Court. The harsh treatment, however, accorded other defense counsel and the Lower Court's general attitude toward the defense worked to the detriment of Appellant, resulting in the deprivation of a fair and impartial trial.

When the danger of the judge swaying the jury adversely to the defendant's cause is enhanced, the courts are quick to hold that criticism or even discourtesy to defense counsel will amount to reversible error. See, e.g., Withrow v. United States, 1 F.2d 858 (1924). In the case of Billeci v. United States, 184 F.2d 394, 93 U.S. App. D.C. 36 (1950), this Court took the opportunity to discuss the role of the federal trial judge in criminal cases and stated that:

> He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his view of the guilt or innocence of the accused. 184 F.2d at 403.

In a most profound decision with respect to the instant case, the Court in Peckham v. United States, 210 F.2d 693, 13 U.S. App. D.C. 148 (1953) reversed conviction because excessive injection of the trial judge into the examination or witnesses and the judge's numerous

comments hostile to defense counsel, notwithstanding provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury. The majority believed that, "in the light of the disorderly atmosphere of the trial, it would require too great a degree of speculation to say that the appellant was fairly tried on the issues relevant to the first count." 210 F.2d at 703.

In the case of the United States v. Ah Kee Eng, 241 F.2d 157 (1957), the Court of Appeals for the Second Circuit took the opportunity to discuss the prejudicial nature of a trial judge's treatment of the defense throughout the trial. The judge in that case exhibited an attitude of impatience and annoyance at objections and interruptions as if they were absurd and unnecessary. The court stated:

> While an appellate court should be loath to read too much into the cold black and white of a printed record, it cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury. Especially is this so where many of counsel's objections must be repeated in order properly to protect his client because he believes in good faith that the judge has ruled erroneously.
>
> While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indications of his view of the proceedings. Thus, repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. Id. at 161 (Emphasis added).

The following is a brief representation of some of the comments made by the judge to defense counsel in the presence of the jury:

1. By Mr. Stempil:

Q. Mr. Aufrecht, are you in charge of seeing that when a body is brought in, that it is undressed and made ready for the Coroner?

THE COURT: I am going to exclude that. That has nothing to do with the case.

Q. Mr. Stempil: Your honor, may we approach the bench?

THE COURT: All he testified to was that the body was identified to him by the nephew and niece of the deceased, that he, in turn, identified it to the Coroner.

Q. Mr. Stempil: May we approach the bench for a moment?

THE COURT: No, No. If you want to make him your own witness on some other point you may recall him at the proper time. Let's move along, gentlemen. It is not customary to waste so much time on identifying the body at the morgue. I notice the other two counsel are acquiescing properly. (Tr. 120).

2. Mr. Thomas: I object.

THE COURT: Objection overruled.

Mr. Thomas: Your Honor, let me state the reason for my objection.

THE COURT: Objection overruled.

Mr. Thomas: But, Your Honor, he is giving an expert opinion.

THE COURT: Marshal, make him sit down, please. (Tr. 123).

3. THE COURT: Cross examination must consist of questions and not of statements of the witness. Now proceed, Mr. Thomas, or there will be no further cross-examination. (Tr. 137)

4. By Mr. Thomas:

Q. Now, as they came out, before they reached this iron fence, you were looking right at them, is that correct?

A. Yes, sir.

Q. And they would have to come straight out towards you, wouldn't they, to get to that iron fence?

THE COURT: Please do not argue with the witness, and do not tell her how they would have to come.

If you want to testify we will swear you in and let you take the witness stand.(Tr. 164).

5. Mr. Stempil: I would like to note my objection to the Court's statement.

THE COURT: Well, you can keep on objecting.

I think there is an awful lot of time being wasted here. I want to make it clear that my remark does not apply to all of the defense counsel.(Tr. 197).

6. THE COURT: It does not make any difference. You are wasting an awful lot of time, Mr. Stempil, because this witness has not identified anyone.

Defense Counsel, and I don't include all of them, have been really imposing on the Court's patience today and wasting a lot of time on irrelevant matters. We haven't yet had any testimony connecting any of these defendants with the offense with which they are charged.

Mr. Stempil: I would like to nail that down and make sure.

THE COURT: I am telling you that we haven't had any evidence yet connecting any one of the three defendants with the offense with which they are charged. You don't have to make it any surer than getting the statement from the Court. (Tr. 200).

7. THE COURT: There is nothing here which indicates that he forcibly took Sampson or anyone else by the arm. I consider than an unfair insinuation. He says he took Sampson by the arm and said, "Come here a minute." Does that mean forcefully?

You know, I think counsel must not insinuate matters of that kind and certainly not in accordance with the highest standard of ethics of the profession. (Tr. 536).

8. THE COURT: Well, I am going to exclude the question as not proper cross-examination.

Mr. Stempil, you have got to move along. You have been just consuming time and most of your questions are outside of the scope of the direct examination and have nothing to do with the issues of this case. (Tr. 571).

9. Mr. Stempil: May the Court direct him to answer the question?

THE COURT: You are not a schoolmaster talking to pupils, you know. (Tr. 575).

10. THE COURT: I am going to exclude that as immaterial, Mr. Stempil. That is absolutely immaterial.

Mr. Stempil: Your Honor, I am going to object respectfully to the Court's exclusion because there was brought in by the Government, by the prosecution, at the beginning of the trial evidence that two people went to the morgue and identified a body as that of George Brown; and they swore under oath that he was a George Brown living at 1713 4th Street, Northwest. Here is a statement that said a man, George Brown, lived at 518 Jefferson Street.

THE COURT: That is immaterial. Now please don't trifle with the Court. We are dealing with the most important type of a case. This is a homocide case and these defendants are charged with a very serious crime. Don't descent into trivialities, because that isn't going to help your client, Mr. Stempil. I made an observation to you before we brought in the jury this morning which I thought was in the interest of your client; and I thought at the time that I made it you realized its importance; but you seem to have forgotten it.

Mr. Stempil: No, Your Honor, I wouldn't forget it.

THE COURT: I know but you have paid no attention to it anyway even if you remember it.

Mr. Stempil: I will pay attention to it, Your Honor, when I think it is important to the protection of my client.

THE COURT: I told you how to protect your client's rights. (Tr. 587-588).

11. Mr. Stempil: Instead of allowing the witness to refresh his memory from notes, Mr. Smithson stopped him and handed him an exhibit.

THE COURT: I understand. He said in order to make things simpler, but that does not mean he wasn't permitted to refer to his notes.

I think counsel should not distort facts like that. I am sure that you do not do it on purpose, Mr. Stempil, but trial counsel must have an accurate memory, should have an accurate memory. (Tr. 614).

12. THE COURT: I am going to exclude that because that is immaterial. It is outside of the scope of the direct examination and it has no bearing on credibility.

Mr. Stempil: But he brought the matter up, Your Honor, when I cross-examined him.

THE COURT: That does not make any difference.

By Mr. Stempil:

Q. Mr. Young, after you--

THE COURT: You know, the Court expects all members of the Bar both to know the basic rules of evidence and also, knowing them, to conform to them. (Tr. 657).

13. THE COURT: I do not care whether there is or not. The Court finds from the undisputed testimony that all three defendants were arrested on the afternoon of March 9th, and then released presumably because there was not sufficient evidence to hold them, or to charge them. They were all brought back, they were all rearrested on the 20th of March.

These facts are established, and do not waste time. You have been wasting time, you know, and the time has some value, Mr. Stempil. This witness has been on the stand for half an hour and you have not elicited anything that is relevant to the issues.

Mr. Stempil: I object, Your Honor.

THE COURT: You have to move more expeditiously. (Tr. 1045).

14. THE COURT: Now let us more aloog (sic), gentlemen. Do you know what you are trying to prove by this witness that is on the witness stand.

Mr. Stempil: Yes.

THE COURT: Very well, then suppose you get right to what you want to prove by the witness. I was not sure whether you did or not. (Tr. 1091).

15. Mr. Mr. Smithson:

Q. He hit you. Where, at No. 2 Precinct, Bryant Street, or Homocide?

A. No. 2 Precinct.

Q. All right. Where was it Daly supposedly hit you?

A. Headquarters.

Q. Uh-huh. And where was it Schwab supposedly hit you?

A. 57 Bryant Street and also at Headquarters.

Mr. Stempil: Your Honor, each time the defendant makes an answer Mr. Smithson says --

THE COURT: Just a moment. This is proper cross-examination. You may not make any statements during cross-examination.

Mr. Stempil: I am going to object to --

THE COURT: On what ground?

Mr. Stempil: The prosecutor, each time the defendant makes an answer, he says --

THE COURT: Just a moment. State your objection in legalistic phraseology. What is the objection?

Mr. Stempil: The prosecutor, after each time the defendant makes an answer, the prosecutor says uh-huh. I would ask him not to say it.

THE COURT: Don't be ridiculous. Sit down, please (Tr. 1259-60).

16. THE COURT: Defense counsel, all counsel, must comport themselves with proper decorum that befits a courtroom.

Mr. Thomas: I object to that remark.

THE COURT: The same decorum is required in a courtroom that would be required in a church while services are going on. (Tr. 1361).

17. By Mr. Smithson:

Q. Is it not a fact that you didn't believe that he had shot him and told him that he was spoofing and he repeated it several times to you?

Mr. Thomas: I object to what this defendant believed.

THE COURT: Objection overruled. This is proper cross-examination and you know that it is. Please don't make objections that are obviously unfounded. (Tr. 1386-87).

In addition to the above remarks made by the trial court to counsel, the record further indicates that the distinction between prosecutor and judge was not completely followed. For example, on one occasion the court "suggested" that the prosecutor withdraw an exhibit from the record

when defense counsel began cross-examination on this exhibit (Tr. 106). And, on numerous occasions, the Court took over cross-examination (See, e.g., Tr. 549, 564). Moreover, as evidenced from the remarks set out above, the Court disallowed questions of the defense without any objection being made by the Government.

All these matters, considered as a whole, have deprived appellant of a fair and impartial trial. The actions of the Lower Court demonstrated a bias and lack of impartiality which may have influenced the jury. The judgment should be reversed. Peckham v. United States, supra.

III.

THE APPEARANCE OF THE APPELLANT BEFORE JURY IN MANACLES WAS PREJUDICIAL

This Court in Blaine v. United States, 78 U.S. App. D. C. 64 (1943), 136 F. 2d 284, recognized that "in a criminal trial the right of the accused to appear before the jury without manacles has always been acknowledged and ought not to be denied except where the character of the accused and the danger of escape or disorder make a different course necessary." 136 F. 2d at 285.

The tenth circuit in Way v. United States, 285 F. 2d 253, 254 (1960), stated:

> It is the general rule that under ordinary circumstances freedom from handcuffs, shackles, or manacles of a defendant during the trial of a criminal case is an important component of a fair and impartial trial. In other words such procedure should not be permitted except to prevent the escape of the accused, to prevent him from injuring others, and to maintain a quiet and peaceable trial.

In the instant case, the Appellant was manacled, except when testifying, through most of the trial and in plain view of the jury. The

circumstances leading to the restraints were never completely explained although it appears to be caused by an altercation between Appellant and two marshals out of the courtroom during the trial. There was some indication, however slight, that Appellant may not have been the combating movant (Tr. 524). One defense counsel indicated a desire to have the Lower Court fully look into the incident (Tr. 527)

The justification for recognition of the defendant's right to be free from restraints was sumed up in the early case of State v. Kring, 64 Mo. 591, (1877), the Court setting forth that:

> When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, upon his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and not one to be trusted, even under the surveillance of officers. Besides, the condition of a prisoner in shackles may, to some extent, deprive him of the free and calm use of his faculties. (Emphasis added).

The judge in the instant case, while having discretionary power, should have at least had a hearing out of the jury's presence to determine whether there was in fact a real need for the restraints. This is particularly true in a case so important that the slightest prejudice to the defendant could have meant life or death. Under the circumstances the restraining of the Appellant was an abuse of discretion and prejudicial.

IV.

THE CONFESSION OF APPELLANT ON MARCH 20, 1960 WAS OBTAINED IN VIOLATION OF RULE 5(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THUS ITS ADMISSION TO EVIDENCE CONSTITUTES REVERSIBLE ERROR

Rule 5(a) of the Federal Rules of Criminal Procedure states in part:

> An officer making an arrest under a warrant issued upon complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer impowered to commit persons charged with offenses against the laws of the United States.

The duty of an arresting officer is to bring the arrested person before a judicial officer without unnecessary delay. Mallory v. United States, 354 U.S. 449 (1957). A confession elicited during a period of illegal detention is inadmissible in evidence at a trial over the objection of defendant. McNabb v. United States, 318 U.S. 332 (1942).

As noted in Mallory, the arrested person may be "booked" but ". . . he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." 354 U.S. at 454. Therefore, an unnecessary delay which affords the police an opportunity for the extraction of a confession would be illegal and causes the confession to be inadmissible on the trial of the case.[8] That some delay between arrest and arraignment under certain circumstances may be necessary, such as booking, photographing, fingerprinting, and transportation,[9] does not justify the questioning, particularly the questioning specifically designed to elicit damaging statements, prior to arraignment. Mallory supra.

The factual situation presented to the court below does not fall within those rulings that have condoned a brief delay in order that the police may take certain preliminary administrative steps. In the instant case, Appellant was brought to police headquarters, according to the police captain, and by appellant's own testimony at 6:30 p.m. on March 20, 1960

8/ D. C. Code, Section 4-140, requires that members of the Police Department, making arrests without a warrant in certain situations, "shall immediately and without delay" bring such person before the proper court.

9/ As for example that delay condoned in Heideman v. United States, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), cert. den. 359 U.S. 959 (1959).

(Tr. 264, 267, 452, 517, 762-63, 792). Appellant, however, was not taken to the identification bureau until sometime after midnight and was not "booked" until 1:30 a.m., March 21, 1960 (Tr. 362, 740). There was by the same token, testimony that White was brought to headquarters between 7:30 and 8 p.m. on March 20 (Tr. 685, 711, 729 for example). In either event, Appellant was detained for a matter of hours, possibly sic hours, before the administrative steps were taken. The instant case should, therefore, be readily distinguishable from those condoning a brief delay between arrest and arraignment for administrative procedure.

Certain confessions in previous cases had been held admissible due to their spontaneity, or approximation to the arrest. For example, in Mitchell v. United States, 322 U.S. 65 (1944), a confession given within minutes subsequent to the arrival of the accused at police headquarters was held admissible. This is based upon the reasoning that the confession was not the result of a delay between arrest and arraignment and therefore could not violate the Mallory doctrine.

In the instant case, there is no such spontaneous admission. No statement was given by White until beginning between 10:00 and 10:30 p.m., three to four hours subsequent to questioning at police headquarters. Up to that time, Appellant had denied that he was implicated in the alleged crime (Tr. 455, 457, 543, 793). Appellant, upon being confronted with his alleged implication, did, at the outset (Tr. 793), and continued for several hours (Tr. 455, 457, 543) to deny the charge. Furthermore, the question and answer statement came some 30 minutes after the officer questioning him had been instructed to obtain a statement (Tr. 840).[10/] The officer who took

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10/ White had not, to this point, implicated himself in the crime and there could be no justification for the instruction to take the statement.

the statement and participated in the questioning of White did not know previous to such questioning that White was implicated (Tr. 712).

Therefore, not only was the statement not spontaneously given following arrest, but was the result of the extended questioning during the night of March 20, 1960. Those statements given by an accused during a period of illegal detention and as a result of such detention are not admissible against him at trial. Upshaw v. United States, 335 U.S. 410 (1948).

The fact that the day of arrest fell on a Sunday should have no bearing on the delay in arraigning appellant and hence the admissibility of any statement made by him during the period of delay. As the court noted in Akowskey v. United States, 81 U.S. App. D.C. 353, 158 F. 2d 649 (1946) ". . . by law and practice" a prisoner may be brought before a committing magistrate "at any hour." The court further noted in Jones v. United States, 113 U.S. App. D.C. 256, 307 F. 2d 397 (1962), that the fact that the delay occurred on Sunday does not place the case outside of Mallory.

Appellant was brought to police headquarters between 6:30 and 7:30 p.m. on March 20, 1960. Administrative steps were not taken with regard to this accused until after midnight. The arraignment was not had until the next morning. During the period between which the accused was brought to police headquarters and the time at which the alleged statement was made, appellant was subjected to extended interrogation. In regard to the questioning, the record demonstrates that White was first questioned for 15 to 20 minutes at 6:30 p.m. (Tr. 264, 268, 517). After the initial questioning, the accused was subjected to questioning by various officers

throughout the night until the time that the statement was given (Tr. 269, 272, 313, 314, 686, 687-688, 711, 731, 740, 766, 792, 830). At the very least, three different officers questioned the accused throughout the night (Tr. 830).

Captain Daly spoke to White on several occasions throughout the night of March 20, 1960 for 15 to 20 to 30 minutes at a time (Tr. 792). Sergeant Pixton testified that he talked to White continuously from 10 until White was taken to the identification bureau sometime after midnight (Tr. 740). No advice or warning of any kind as to White's right not to answer questions or that his answers might be used against him was given until immediately prior to the statement, three to four hours after White was brought to the police station (Tr. 452, 687, 733, 737, 793). Therefore, White was without, so far as this record shows, that important knowledge which would have been imparted to him by a committing magistrate.

In Coleman v. United States, ____U.S. App. D. C. ____, 313 F. 2d 576 (1962), the accused after being questioned on several prior occasions,[11/] was arrested at 6:45 p.m., was interrogated between 7:30 and 8:00 p.m., and then, at 8:45 p.m., questioning was resumed and a confession was obtained. From 9:10 to 10:50 p.m., it was reduced to writing, and the defendant was booked. He was arraigned at 10:00 a.m. the next day. This Court found that the delay in Coleman was unnecessary. The fact that it occurred during the nighttime would not excuse such delay, citing Akowskey and Jones, supra. This Court stated that the delay was of such a nature to give opportunity for the extraction of a confession, and was not consumed only by preparing of papers, booking, photographing, fingerprinting and transportation. Here, we have an almost identical case where White

11/ White was detained and questioned for a period exceeding 24 hours on March 8, 1960 (Tr. 747, 1045).

was not arraigned until the next day and was not booked, photographed or fingerprinted until after extended questioning and the elicitation of the statement.

Again, in Tatum v. United States, ___ U.S. App. D. C. ___, 313 F. 2d 579 (1962), defendant was arrested at 8 p.m. and brought to the police precinct at 8:50 and questioned for 10 minutes. Then he was placed in a cell block. He was booked at 10:30 p.m. and questioned until midnight. Between 12:15 and 12:25, he confessed and the written confession was completed at 3:00 a.m. Such confession was held inadmissible as a violation of rule 5(a) and the Mallory doctrine. The court again stated that a magistrate is available at any hour.

In Watson v. United States, 101 U.S. App. D. C. 350, 249 F. 2d 106 (1957), defendant was arrested at 6:40 p.m. and questioned throughout part of the night until 3:15 a.m. when some disclosures were made. These disclosures were also held inadmissible and the Court noted once again that though there may be a brief delay for booking, an accused is not to be taken to headquarters for the purpose of being subjected to interrogation in order to determine whether he is to be charged, and thereafter be convicted of his own mouth.

Based upon the foregoing authority, the trial court committed reversible error by receiving into evidence the statement made by Appellant on March 20, 1960.

V.

THE COURT SHOULD HAVE DIRECTED A JUDGMENT OF ACQUITTAL BECAUSE THE GOVERNMENT WAS BOUND BY THE EXCULPATORY MATTERS IN THE CONFESSIONS AND ADMISSIONS REGARDING ABANDONMENT

In Epps v. United States, 81 U.S. App. D. C. 244, 157 F. 2d 11, (1946), this Court refused to bind the Government to statements made by the

accused immediately upon arrest. It was held that the police officer testifying was merely relating the circumstances of the arrest and no more than the accused had stated on the stand. The Court concluded that they knew of no law which would make the policemen's recital of the statement by accused at the time of arrest binding on the Government. The Epps case did not deal with a confession and can be distinguished from the instant situation.

In Pratt v. State, 59 Tex. Crim. Rep. 262, 129 S.W. 364 (1906), the Court of Criminal Appeals reversed a conviction of second degree murder when the state had introduced a confession of the accused admitting commission of the homicide, but claiming self-defense. The Texas Court held that when the admissions or confessions of a party are introduced in evidence by the State, then the whole of the admissions is to be taker together, and the state is bound by them unless they are shown to be untrue by the evidence. See also, Jones v. State 29 Tex. App. 20, 13 S.W. 990 (1890).

In the instant case, the confession admitted against appellant showed that there was an abandonment of the attempted robbery. According to the confession, Appellant,at the scene of the alleged crime, "kept on insisting to the other man with me that we should go ...." (Tr. 821). Appellant was moving down the stairs when the gun blast was heard.

If in fact this Court might find that Appellant had consummated the attempted robbery, then it must be found that the attempted robbery had been completed as to appellant when the gun accidently killed the deceased. The State, having given credit to this latter theory by offering these admissions in evidence, has stamped the nature and character of defendant's crime upon the transaction ...." State v. Dashman, 153 Mo. 454,55 S.W. 69 (1900).

The Government is bound by the theory of abandonment or in the least that the attempted robbery was concluded as to appellant when the homicide occurred. The Government introduced no contradictory evidence. The nature of appellant's crime, if any, has been stamped. The judgment of the Lower Court must be vacated.

VI.

APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL AND THE JUDGMENT OF CONVICTION MUST BE VACATED

The Sixth Amendment to the United States Constitution provides in part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial ...." This right is necessarily relative and depends on the circumstances of each case. Williams v. United States, 102 U.S. App. D. C. 51, 250 F. 2d 19, (1957). This right, however, does not depend upon a showing of prejudice by the accused. United States v. Lustman, 258 F. 2d 475 (1957) Cert. den. 358 U.S. 475 (1958).

In the instant case, appellant was originally sentenced on April 21, 1961. This court initially ordered the District Court to entertain a motion for a new trial on July 21, 1961 and then, sua sponte, awarded a new trial on June 6, 1962. Appellant did not bring about the aforesaid matters nor did appellant either pro se or through counsel request any continuance of the trial date which finally was set for April 22, 1963. Thus two years elapsed since sentencing, twenty months since the original action by this court and over ten months since the new trial award.

In accordance with this Court's recent case of Smith v. United States, _____U.S. App. D. C._____, No. 17106, decided August 15, 1963, the judgment of conviction must be vacated. In the Smith case, this court reversed a conviction because the defendant, imprisoned for nearly six months

without trial, was denied his right to a speedy trial. Moreover, it cannot be argued that appellant waived his constitutional right to a speedy trial because he acquiesced since he desired no new trial. See, Mann v. United States, 113 U.S. App. D. C. 27, fn 2, 304 F. 2d 394, (1962), cert. den. 371 U.S. 896 (1962).

VII.

THE TRIAL COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY ON THE THEORY OF ABANDONMENT

Regarding the theory of abandonment the Court instructed the jury as follows:

> If a person plans or participates in planning a robbery but repents and voluntarily abandons and detaches himself from the plan to rob before the fatal shot is fired, then he cannot be said to be engaged in attempting to perpetrate the robbery at the time the shot was fired and so cannot be guilty of murder in the first degree under this indictment. However, in order that there be such an abandonment, there must be some circumstances indicating the abandonment. Whether such an abandonment took place is a question for you ladies and gentlemen of the jury to decide. (Tr. 1703. Emphasis added).

The jury requested this instruction to be read again (Tr. 1703), indicating a definite concern regarding the question of abandonment. Appellant takes issue with the word "repents" used in the instruction. This critical word would rule out abandonment because of fear. The Court in People v. Nichols, 230 N. Y. 221, 129 N.E. 883, 886 (1921) stated:

> While it may make no difference whether mere fear or actual repentence is the moving cause, one or the other must lead to an actual and effective retirement ...."

If this be true, then the Lower Court erred in the instruction by failing to include the alternative of fear as a reason for abandonment. It is submitted that the case of Mumforde v. United States, 76 U.S. App. D.C. 107, 130 F. 2d 411, (1942), is incorrect in failing to recognize this point which was not, however, at issue.

Counsel for appellant did not object to the Court's instruction. This fact, however, should not work to preclude consideration of the record for error prejudicial to defendant which he did not urge. Stewart v. United States, 94 U.S. App. D.C. 293, 214 F. 2d 879, (1954), (Reversed on other grounds, 366 U.S. 1 (1961).

VIII.

THE SECOND TRIAL PLACED
DEFENDANT IN DOUBLE JEOPARDY

The United States Constitution, Amendment 5, guarantees that "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb ...." A defendant is placed in jeopardy once he is put to trial before a jury. Green v. United States, 355 U.S. 184 (1957). In United States v. Ball, 163 U.S. 660, 669 (1896), it was stressed that the prohibition against double jeopardy

> . . . is not being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

And in Helvering v. Mitchell, 303 U.S. 391, 398 (1938), it was said that "double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction."

In the instant case, the accused was placed in jeopardy when the first jury was impaneled. This Court subsequently vacated the judgment of the first tribunal, sua sponte, at the urging of the Government. To place the accused through a second trial for his life not at his urging constituted double jeopardy. This case is distinguishable from those holding that double jeopardy does not attach when the defendant seeks a mistrial. Here the defendant sought no mistrial and did not prosecute an appeal.

CONCLUSION

WHEREFORE, based upon the above premises, it is respectfully submitted that the Trial Court erred to the prejudice of Orson G. White, Appellant herein, and it is respectfully prayed that this Court:

1. Reverse the conviction entered in the Court below and remand the case to the Trial Court with instructions to enter a judgment of acquittal; and

2. Grant such other relief as this Court may deem just and proper.

Respectfully submitted,

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September 16, 1963

ACKNOWLEDGMENT OF SERVICE

The undersigned hereby acknowledges receipt, this 16th day of September, 1963, of a copy of the foregoing Brief For Appellant.

By:_____

FOR: THE UNITED STATES ATTORNEY
WASHINGTON 1, D. C.

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,992

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

REPLY BRIEF FOR APPELLANT

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December 13, 1963

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TABLE OF AUTHORITIES

I.

CONTRARY TO THE GOVERNMENT'S ARGUMENT THE EVIDENCE ESTABLISHES THAT THE CONFESSION OF APPELLANT WAS INADMISSIBLE

Appellee argues that the confession of appellant was obtained during a lawful detention and therefore is not contrary to Mallory v. United States, 354 U. S. 449 (1957). In support of this conclusion sole reliance is placed on the testimony of Officer Pixton indicating that Appellant was brought to police headquarters at approximately 8:00 p.m. on March 20, 1960, and was not questioned until approximately 9:45 p.m. by Captain Daly. Appellee's brief essentially ignores the preponderance of testimony given not only on behalf of Defendant but by the Government's own witness.[1/]

Captain Daly's own testimony indicates that White was brought to police headquarters at approximately 6:30 p.m. (Tr. 264, 267, 452, 517, 792) and questioned by the Captain on more than one occasion throughout the night.[2/] Moreover, Appellant throughout the detention consistently denied his implication in the alleged crime (Tr. 455, 457, 543, 793). The testimony (Tr. 792) reveals the following:

1/ It should be noted that the Government witness in question is not a disinterested witness, but a police officer intimately connected with the events of March 20, 1960. The Government should be bound by the testimony of its own witness, particularly when that witness is a member of the Government and the superior to the other police officers who testified in behalf of the Government. Appellee's brief argues that the evidence supports the judge's ruling, citing Jackson v. United States, 114 U. S. App. D. C. 181, 185 F. 2d 572 (1962). But in Jackson the evidence at best was nebulous and the conflict in testimony, as to time of delay, was between defendant and police. Here, the conflict occurs between the police themselves.

2/ It is evident that there was substantially more than "virtually no interrogation" which the Government states in its brief. Moreover, the fact that there was more than nominal questioning involved here further distinguishes the Jackson case cited by Appellee.

Q. (By Mr. Smithson) Now, there came a time when you spoke to Orson White on the afternoon or evening of March the 20th, 1960. Captain, would you tell us the approximate hour you first spoke to White?

A. (By Captain Daly) I would say around 6:30 or a little after.

Q. Now, Captain, do you recall how long you talked to him at that time?

A. I talked to him on several different occasions that night. I would say maybe fifteen or twenty minutes, half hour at a time.

Q. Now, on this occasion, the first time you spoke to him, what is your best estimate, if you have one, of the time you spent talking to him?

A. I would say around twenty minutes.

Q. Tell me, sir, at that time did you make him any promises to secure any statement from him?

A. No, sir.

Q. Did you threaten him or physically abuse him?

A. No, sir.

Q. Did you at any time, sir, warn him, given him any advice as to his rights?

A. No, sir.

Q. Did you ever at any time tell him that he was accused or implicated in anything?

A. Yes, sir.

Q. Do you recall when that was?

A. It was during our first conversation.

Q. At the time of the first conversation when you told him he was implicated, let me ask you this, Captain, at that time did he give you any statement that implicated himself in the death of George H. Brown?

A. No, sir.

Appellee speaks in terms of a delay of 2½ hours, which, taking its own testimony as a whole, is incorrect.[3/] No administrative steps were taken until 1:30 a.m. the day following the arrest (Tr. 362, 740). Even taking the facts portrayed by Appellee, it still remains that there was a delay of 5½ hours from the time Appellant was brought to police headquarters to the time that administrative steps were taken. This uncontroverted evidence and the attendant circumstances characterize the delay as one that was "of a nature to give opportunity for the extraction of a confession." Mallory, 354 U.S. at 455. Appellee's own evidence conclusively demonstrates that the failure to exclude the confession was prejudicial error and judgment must be reversed. Jones v. United States, 113 U. S. App. D. C. 256, 307 F. 2d 397 (1962).

Not only is appellee's testimony at trial dispositive of the question at hand but its brief contains controlling precedent to reverse the judgment below. Coleman v. United States, _____U. S. App. D. C. _____, 313 F. 2d 576 (1962) held a delay between arrest at 6:45 p.m. and a "threshold" confession at 8:50 p.m. was unnecessary and unlawful. Further, a delay of 3½ hours in Tatum v. United States, _____U. S. App. D. C. _____, 313 F. 2d 579 (1962), was unnecessary and unlawful.

II.

THE GOVERNMENT'S REPLIES TO THE OTHER ARGUMENTS RAISED IN APPELLANT'S BRIEF OF SEPTEMBER 16, 1963, ARE INSUFFICIENT

1. Appellant White has argued that this criminal conviction cannot be sustained since the confession of Appellant was not corroborated. Appellee argues that certain specified facts and conclusions establish the corroboration. Appellant submits that those facts cited by the Government

3/ The Government's position on the confession of Appellant White is magnified and should be carefully scrutinized since Appellee admits error in the admissibility of Appellant Sampson's confession. Appellant herein submits that the facts incident to both the White and Sampson confessions cannot be substantially distinguished.

do not constitute "substantial independent evidence" required by the case of Opper v. United States, 348 U. S. 84 (1954). Moreover, the corrobative evidence does not implicate the accused as required in Smith v. United States, 348 U. S. 147 (1954).

2. Appellant White has argued that numerous hostile remarks of the Judge and his repeated indications of impatience and displeasure with defense counsel for two other defendants in the consolidated trial created a disorderly atmosphere which prejudices the whole cause. Appellee relies on the fact that the charge to the jury included an admonition to ignore discussion and remarks between court and counsel. When, however, it cannot be shown with reasonable certainty that the harm has been undone a reversal is required. Accord United States v. Ah Kee Eng, 241 F. 2d 157 (1957). Appellant submits that it is impossible to determine that the jury reached a fair and impartial judgment in light of the disorderly atmosphere at the trial.

3. Appellant has argued that the jury must have necessarily conceived of prejudice against the accused by the lack of freedom from shackles during a part of the trial. Appellee counters that this was a reasonable restraint and there was no request for an instruction on this matter. Appellant submits that such an instruction would have been to no avail and that the Judge abused his discretion by not completely considering the matter before the placing of restraints.

4. Appellant White has argued that the Government was bound by the exculpatory statements in Appellant's confession regarding the defense of abandonment. Appellee cites the case of Epps v. United States, 81 U. S. App. D. C. 244, 157 F. 2d 11 (1946), in reply. Appellant submits that this case has been distinguished and continues to rely on Pratt v. State, 59 Tex. Crim. Rep. 262, 129 S.W. 364 (1906), and State v. Dashmen, 153 Mo. 454, 55 S.W. 69 (1900).

5. Appellant White has argued that he has been denied the right to a speedy trial. Appellee contends that this argument is without merit since the record on this issue is not complete. Appellant submits that the delay between the award of the new trial on June 6, 1962, and the trial of April 22, 1963, not caused by Appellant, resulted in a violation of Appellant's constitutional rights under the Sixth Amendment.

6. Appellant has argued that the instruction regarding the defense of abandonment was faulty and resulted in clear prejudicial error. In reply Appellee cites Mumforde v. United States, 76 U. S. App. D. C. 107, 130 F. 2d 411 (1942). Appellant submits that the error asserted herein was not in issue in the Mumforde case.

7. Appellant White has argued that the second trial has placed him in double jeopardy. In support of its position that the double jeopardy issue in this case has been laid to rest, Appellee cites the case of Pea v. United States, No. 17824, decided October 10, 1963. This case has been treated and clearly distinguished by Appellants Harrison and Sampson in their reply briefs dated December 6, 1963. Appellant White herein adopts those arguments.

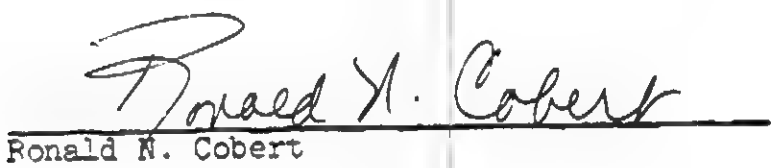
WHEREFORE, based upon the above premises, it is respectfully submitted that the Trial Court erred to the prejudice of Orson G. White, Appellant herein, and it is respectfully prayed that this Court:

1. Reverse the conviction entered in the Court below and remand the case to the Trial Court with instructions to enter a judgment of acquittal; and

2. Grant such other relief as this Court may deem just and proper.

Respectfully submitted,

Thomas H. Wall



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December 13, 1963

ACKNOWLEDGEMENT OF SERVICE

The undersigned hereby acknowledges receipt, this 13th day of December, 1963, of a copy of the foregoing Reply Brief For Appellant.

By: _____

FOR: THE UNITED STATES ATTORNEY
WASHINGTON 1, D. C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,993

Joseph R. Sampson,

Appellant

v.

United States of America,

Appellee.

Reply Brief For Appellant

APPEAL FROM VERDICT AND JUDGMENT
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Of Counsel:

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(By Appointment of this Court)

December 6, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,993

Joseph R. Sampson,

Appellant

v.

United States of America,

Appellee.

REPLY BRIEF FOR APPELLANT ON APPEAL FROM VERDICT AND JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I. Because Of The Conceded Error In Admitting Sampson's Pre-Trial Statements, The Judgment Should Be Reversed With Directions For A Judgment Of Acquittal.

Since the Government concedes that Sampson's pre-trial statements were inadmissible, the only question as to him is whether a third trial should be ordered or the Court below directed to enter a judgment of acquittal.

In Killough v. United States, ____U. S. App. D. C. ____, 315 F. 2d 241, a recent case of reversal for an illegally obtained confession, a new trial was ordered. But presumably this was to enable the Government to prove its case by other available evidence of guilt not originally offered because of reliance upon the confession.

Here, however, the record indicates that the Government did not rely solely on the confession but used every available scrap of evidence having any conceivable probative force. Thus, it offered the testimony of Evans as to his having loaned his car to the appellants the night preceding the decedent's death (Tr. 223 et seq.) and the testimony of Young that he saw Sampson watching the decedent at a restaurant the morning of the decedent's death (Tr. 627 et seq.). This testimony, of course, was so slight that, without the illegally obtained

confession, it was clearly subject to a motion for a judgment of acquittal, and it must be assumed no stronger evidence was offered because it did not exist.

The testimony of codefendants White and Harrison was, of course, no waiver of Sampson's right to test the sufficiency of the Government's case by his motion for judgment of acquittal. Cephus v. United States (No. 17712, September 12, 1963), ____U. S. App. D. C. ____, ____F. 2d. ____.

We submit, therefore, that the judgment against Sampson should be reversed with directions to the trial court to enter a judgment of acquittal. (See Yates v. United States, 354 U.S. 298, 328, where the Court held that the evidence against certain of the appellants was "so clearly insufficient that their acquittal should be ordered", without a retrial.)

II. Pea v. United States Is No Precedent Here.

As to double jeopardy, the Government contends that this question was by implication decided in Pea v. United States, No. 17824, decided October 10, 1963, though no opinion was issued by the Court in that case. But the Statement of Questions Presented in appellant Pea's brief, required under Rule 17(b) (1), did not present the double jeopardy question, the issue being

merely discussed in the argument and in the Government's brief, so that the point was presumably disregarded by the Court under Rule 17(g),[1] as no opinion was issued noticing or passing on the issue. It is, of course, well settled that "Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents". Webster v. Fall, 266 U. S. 507, 511. In accord, Bard-Parker Co. v. Commissioner Int. Rev. (CA 2, 1954) 218 F. 2d. 52, 57.

We submit, therefore, that Pea is not a controlling precedent here and that, if the case is not reversed with an order to dismiss the indictment under Point I above, such order should be issued for violation of the Fifth Amendment guarantee against double jeopardy, for the reasons set forth in our initial brief.

III. The Government's Confession Of Error As To Sampson Under Mallory Makes Reply On Other Issues Unwarranted.

In a footnote to its confession of error as to Sampson, under Mallory, the Government says "in view of what has been

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1/"(g) POINTS NOT PRESENTED. Points not presented according to the rules of the Court, will be disregarded, though the Court, at its option, may notice and pass upon a plain error not pointed out or relied upon."

said above, it is unnecessary to answer Sampson's other contentions . . ." In light of this statement, part III of the Government's brief is relevant only as to White and Harrison so that no reply as to Sampson seems appropriate. However, lest our silence be possibly misconstrued as agreement, we respectfully submit that part III of the Government's brief fails completely to excuse the errors pointed out in our original brief, and in the briefs of White and Harrison.

Respectfully submitted,

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Attorney for Appellant
(By Appointment of this Court)

CERTIFICATE OF SERVICE

I certify that on this 6th day of December, 1953, I mailed, postage prepaid, a copy of the foregoing to the United States Attorney, David C. Acheson, in the United States Court House, Washington 1, D. C.

Monroe Oppenheimer

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,993

Joseph R. Sampson,

Appellant

v.

United States of America,

Appellee.

Brief For Appellant

APPEAL FROM VERDICT AND JUDGMENT
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

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October 24, 1963

Statement of Questions Presented

1. Whether a second trial violated the double jeopardy provisions of the Fifth Amendment where it was ordered sua sponte by the Court of Appeals after the first verdict was set aside because at the first trial appellant's "counsel" was an imposter?

2. Whether under the circumstances of the case appellant was denied a speedy trial under the 6th Amendment?

3. Whether appellant was entitled to a judgment of acquittal for lack of corroboration of an essential element of the purported confession?

4. Whether the purported confession of appellant introduced at the trial was obtained contrary to rule 5(a) of the Rules of Criminal Procedure?

5. Whether appellant was deprived of a fair trial because placed in handcuffs and waist chains on the basis of unverified hearsay charges of a supposed attack on a deputy marshal?

6. Whether appellant was denied a fair trial because of the hostile and belittling attitude of the Court towards his counsel and otherwise showed bias to the prosecution and against the defense?

INDEX

AUTHORITIES CITED

Miscellaneous

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 17,993

Joseph R. Sampson,

Appellant

v.

United States of America,

Appellee.

BRIEF FOR APPELLANT ON APPEAL FROM VERDICT AND JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Jurisdictional Statement

This is an appeal from a guilty conviction and judgment for first degree murder. D. C. Code §22-2401. The District Court had jurisdiction under D. C. Code 11-322 and 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The First Trial and Appeal

On April 19, 1960, Joseph R. Sampson, Appellant herein, and appellants White and Harrison, were indicted for the murder of one George H. Brown, one count charging deliberate and premeditated malice, and the other charging felony murder, i.e., in the perpetration of a robbery.

Appellant Harrison was represented at the trial by Attorney Perry Howard of the District Bar. Appellants Sampson and White were represented in the trial by a layman, pretending to be "L. A. Harris", an attorney admitted to practice in the District of Columbia. During the trial, the Assistant United States Attorney at one point referred to "Harris" as "this so-called counsel," although he later denied any knowledge of the impersonation, explaining that his remark was prompted by "Harris's" improper trial tactics. Also, during the trial

when "Harris" suffered an apparent heart attack in open court, the Court appointed Mr. Howard to represent Sampson and White with their consent. However, the Assistant United States Attorney objected and "Harris", recovering from his illness, resumed his impersonation. Guilty verdicts were returned on October 19, 1960 and death sentences imposed on April 21, 1961.

"L. A. Harris" still purported to represent appellants when the death sentences were imposed. It was later stipulated that, anticipating these sentences, Harris "had prepared notices of appeal, typed up ready for signature, and that he asked the Court to "hold these boys in the cell block until he was able to go down and get their signatures." It was further stipulated that appellants signed the notices of appeal only after speaking to Harris for a moment or two.[1/]

On May 31, 1961, this Court appointed counsel for all three appellants. On June 14, 1961, the three court appointed counsel filed a joint designation of the record on appeal and submitted a briefing schedule.

Later in June, "L. A. Harris" was revealed to be an imposter, and on July 3, 1961, the United States Attorney filed a motion in each of the appeals in which the United States

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1. Hearing of February 15, 1963 on Sampson's motion to quash the indictment on grounds of double jeopardy, pp. 9, 10, 11.

> "requested the instant case be remanded to the District Court to determine whether the appellant was afforded his constitutional right to the effective assistance of counsel, in his defense, and in the event it is determined the appellant received effective assistance of counsel, the instant appeal be reinstated."

On July 21, 1961, the Court entered an order "upon consideration of appellee's motion to remand, it is Ordered that . . . this case is hereby remanded to the District Court with leave to entertain a motion by the defendant to vacate and set aside judgment and to award a new trial . . . Further Ordered . . . that in the event the Court does not entertain such a motion . . . or denies the same, the Defendant . . . may take an appeal thereupon, in which event the present appeal shall be reinstated."

In the District Court, the defendants refused to file motions for new trial, and accordingly the District Court by Order of October 4, 1961 directed that the case be resubmitted to the Court of Appeals (J. A. 15).

Thereafter on January 26, 1962, the Court of Appeals entered an order "that these appeals are reinstated . . . . that counsel in their briefs and argument, in addition to any other questions they wish to present to the court, shall address themselves to: (1) whether the accused had effective

assistance of counsel at the trial; (2) whether the court can consider and reverse upon a ground disclaimed by appellant." No briefs, however, were filed, the court appointed attorneys having filed a Motion to Hold Further Proceedings in abeyance pending final decision in No. 16,711, Bell v. United States.

On February 23, 1962, the court appointed attorney for appellant Sampson filed Motion for Leave to Withdraw on the ground that appellant Sampson did not find his advice acceptable. The motion was granted on February 28, 1962, and the time for filing Sampson's brief extended to March 31, 1962. On March 26, 1962, a second attorney was appointed by the Court for Sampson. He likewise moved for Leave to Withdraw on May 11, 1962, on the ground that his views as to appellant's best course were different from appellant's views. On May 17, 1962, this Court entered an order, reciting the withdrawal of the two court appointed counsel, denying the request for the appointment of a third, and concluding "It is Further Ordered by the Court, sua sponte, that the parties are allowed to and including May 28, 1962, to show cause why the judgment of the District Court . . . should not be vacated and the case remanded to the District Court with directions to award appellant a new trial."

Thereupon, appellant now represented by Mr. I. William Stempil as counsel, filed a statement in response to the show cause order stating that

> "(1) He will not waive any of his constitutional rights afforded him.
>
> "(2) He believes that the office of the United States Attorney is required . . . to see that justice is done in all cases, and in the instant case, the onus is without a doubt on the United States Attorney . . .
>
> "(3) The United States Attorney is well aware of the facts surrounding the trial . . . and since the Court too is aware of the circumstances . . . appellant prays that this Court . . . protect him by ordering the United States Attorney to take the necessary steps provided for by law in such an instance without forcing the appellant to make any move at this time which might be construed as a waiver of any of his constitutional rights."

Thereafter, by Order of June 12, 1962, the Court ordered that the judgment of the District Court "is vacated and that this case is remanded to the District Court with directions to award appellant a new trial."

The Second Trial

Motions were filed and denied objecting to a second trial on grounds of double jeopardy; Sampson also filed a habeas corpus proceeding alleging denial of a speedy trial which was also denied. The case came to trial before the Honorable Alexander Holtzoff on April 22, 1963, after various delays not

consented to by Sampson. At the trial, the Government abandoned the first count of premeditated murder and relied solely on the murder-felony count.

The theory of the government was that appellants had accidentally shot one Brown while perpetrating an attempted robbery. Major reliance was placed on the extra-judicial confessions obtained from all of the appellants while in police custody, the admissibility of which was questioned under the Mallory doctrine.

Appellant Sampson was charged with having driven Harrison and White to the vicinity of Brown's residence. Harrison admitted in court to the accidental killing of Brown with a gun, but asserted that at the time of the accident he was trying to see Brown to pawn the gun with him. (Tr. 1338-1339). There was no evidence of any actual theft or other corroborative evidence of this robbery plan described in the confessions given to the police. Indeed, the prosecution's own version was that Harrison and White "fled from the scene without accomplishing the robbery" that was claimed to have been planned (Tr. 17).

On May 8, 1963, a verdict of guilty was returned with a recommendation for life imprisonment (Tr. 1709). Appellant Sampson moved for mistrial and for judgment of acquittal at

conclusion of the Government's case (Tr. 952) and again at the conclusion of all the evidence (Tr. 1524). Motion on behalf of Sampson for new trial and/or in arrest of judgment was filed on May 13, 1963 (J. A. 38) and denied on May 14, 1963 (J. A. 40). Notice of Appeal was filed June 24, 1963 (J. A. 45).

In Appellant Sampson's motion for new trial and/or in arrest of judgment, point 5 stated:

> "The Court's conduct towards the defendant's counsel in the presence of the jury created a situation wherein it not only belittled defendant's counsel in the eyes of the jury but also served to unnerve him to such an extent and throw him off balance to such a degree that he could not devote his best talents to the defense of Joseph R. Sampson."

and point 7 stated:

> "The remarks of the trial court to counsel for the defendant in the presence of the jury insinuated that the actions of defendant's counsel were unethical and prejudiced the defendant's cause before the jury."

The specific instances believed to support these charges are set forth in Part VI of the Argument herein.

The facts regarding violation of the Mallory rule are set out in Part IV of the Argument, and the facts as to the prejudicial manacling of appellant in Part V of the Argument.

Constitutional Provisions, Statutes and Rules Involved

See Appendix

Statement of Points

1. That the trial of Appellant constituted double jeopardy under the Fifth Amendment.

2. That the delay in bringing Appellant to trial violated the right to a speedy trial under the Sixth Amendment.

3. That Appellant was entitled to a judgment of acquittal since there was no corroboration of an essential element of Sampson's purported confession, i.e., the attempted robbery.

4. The appellant was entitled to a judgment of acquittal since the purported confession was obtained contrary to Rule 5(a) of the Federal Rules of Criminal Procedure.

5. The appellant is entitled to a new trial because placed in manacles before the jury, on the basis of unverified hearsay charges of a supposed attack on deputy marshals.

6. The appellant is entitled to a new trial because the Court in the presence of the jury was hostile and belittling to counsel for appellant, and in other respects showed bias to the prosecution and against the defense.

Summary of Argument

1. The second trial placed appellant in double jeopardy. He never asked for a new trial nor did he appeal on the ground of the Harris impersonation. Indeed, the only appeal papers filed were prepared by the impersonator himself. The policy of the Fifth Amendment precluded requiring him to run the judicial gantlet twice.

2. Under Smith v. United States, _____u. S. App. D. C. ____, _____ F.2d _____, No. 17,106, decided August 25, 1963, a six months delay before trial was held to violate the "right to a speedy . . . trial" guaranteed by the Sixth Amendment. Appellants, the unwitting victims of the impersonation of counsel at the first trial, are not responsible for the two year delay between the first sentencing and the commencement of the second trial.

3. Assuming a second trial constitutionally permissible, the indictment should have been dismissed for lack of corroboration of an essential element of the confessions. Forte v. United States, 68 U. S. App. D. C. 111, 94 F.2d 236. Here, the crime charged was for an accidental killing in the course of an attempted robbery. Hence, it was necessary to corroborate not merely the death of the victim but the attempted robbery as well. This the evidence did not do.

4. But, in no event can the convictions stand since the confessions were obtained in flagrant violation of Mallory v. United States, 354 U. S. 449 and McNabb v. United States, 318 U. S. 382. Apprehended at 5:30 p.m., listed in the arrest book at 6:30 p.m. appellants were not arraigned until 10 a.m. the following day. In the meantime, their confessions were obtained at 10:20 to 10:30 p.m. The facts are squarely within the decision of this court in Coleman v. United States, _____U. S. App. D. C. _____, 313 F. 2d 576, and Mitchell v. United States, _____U. S. App. D. C. _____, 316 F. 2d. 354, 356.

5. In addition, a new trial is necessary since the trial court abused its discretion in keeping appellant manacled (1) without holding any hearing to determine, independently of the Marshal's views, whether restraints were necessary or (2) at the very least giving an appropriate instruction to the jury that no inferences of guilt were to be drawn from the fact of manacling.

6. Finally, a new trial is necessary because of the numerous hostile and belittling remarks to defense counsel that may well have influenced the jury against appellant, and otherwise favoring the prosecution as against the defense.

ARGUMENT

I.

THE TRIAL BELOW SUBJECTED APPELLANT TO DOUBLE JEOPARDY AND THE JUDGMENT SHOULD BE REVERSED WITH DIRECTION TO DISMISS THE INDICTMENT.

The facts relating to appellant's earlier trial and the appeal thereupon are set forth above in the Statement of the case. Under these facts, we submit, appellant was improperly subjected to a second trial. Therefore, the judgment should be reversed with directions that the indictment be dismissed.

We start with the basic premise that the Fifth Amendment protects "against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." United States v. Ball, 163 U. S. 662, 669 (emphasis supplied). See also Helvering v. Mitchell, 303 U.S. 391, 398.

The only well established exception to this immunity is in the situation where there is a mistrial or where a defendant "procures a judgment against him on an indictment to be set aside", as by his asking for a new trial or taking an appeal (United States v. Ball, 163 U. S. 662, 672) or by attacking the judgment collaterally through habeas corpus.

(Bryant v. United States, 8 Cir., 214 F. 51; United States v. Lowrey, DCWD Pa., 77 F. Supp. 310, affd. 3 Cir., 172 F. 2d 226). This exception is clearly not applicable here, for appellant Sampson never moved for a new trial, appealed or filed a habeas corpus proceeding on the ground on which the new trial was eventually ordered by this Court, sua sponte. The only step taken by appellant for the review of his first conviction was to sign a notice of appeal, prior to the unmasking of "L. A. Harris" as an imposter, which notice was prepared by and signed at the behest of this self-same imposter. This could scarcely be a waiver as contemplated by the exception to the bar against double jeopardy.

Accordingly, when the flaw in the first trial was discovered by the United States Attorney, the only appropriate and permissible procedure in view of the Fifth Amendment, was to move to vacate the verdict and judgment and dismiss the indictment.

II.

APPELLANT WAS DENIED THE SPEEDY TRIAL COMMANDED BY THE SIXTH AMENDMENT

Under Smith v. United States, ____U. S. App. D. C. _____, ____F.2d._____, No. 17,106, August 25, 1963, this court reversed

a conviction because the defendant, imprisoned for six months without trial, was denied the "right to a speedy . . . trial" provided for in the Sixth Amendment to the Constitution.

The appellants here were originally sentenced on April 21, 1961. On July 21, 1961, the cases were remanded by this Court but the second trial did not commence until April 22, 1963, twenty months after the cases were first remanded by this Court, and after delays caused solely by the Government and not requested or acquiesced in by appellant.[2/] In light of the Smith decision, this delay seems a violation of the Sixth Amendment.

Part of the delay, of course, arose from the unique problem presented by the fact that the new trial was not requested by appellants. But, as in the case of the whole double jeopardy issue, appellants were not perpetrators, but the victims of the impersonation perpetrated by the purported "Harris", and the onus of correcting the error was properly assumed by the Government. Hence, appellants cannot be charged with these delays which, under the Smith decision, denied them the "speedy"trial guaranteed by the Sixth Amendment.

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2. The details of the delaying steps are set forth on pages 4 and 5 of Brief of Appellant Harrison.

III.

THE JUDGMENT SHOULD BE REVERSED WITH INSTRUCTIONS TO DISMISS THE INDICTMENT FOR LACK OF CORROBORATION OF AN ESSENTIAL ELEMENT IN THE CONFESSIONS.

Appellant's motion for a judgment of acquittal for lack of corroboration of the confession[3] should have been granted.

In the instant case, the crime charged was for an accidental killing in the course of an attempted felony, i.e., robbery. Hence, even assuming the confessions were admissible despite the violations of the Mallory rule, discussed in Part IV of the Argument, it was necessary to corroborate not merely the death of the victim but the attempted robbery as well.

Forte v. United States, 68 U.S. App. D. C. 111, 94 F.2d 236, is controlling. In that case, the crime charged was transporting a motor vehicle knowing it had been stolen. There was corroboration of the confession that the vehicle was being transported, but no corroboration of appellant's confession

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3. "Mr. Davis (for appellant White) . . . "We move for dismissal on the ground that no corpus delicti has been proven by evidence aliunde of the confession itself." (Tr. 948).

"Mr. Stempil: As to Mr. Davis' motion with reference to the corpus delicti, I would like to adopt that motion in favor of Sampson."

"The Court: Yes. As I stated at the opening of the trial, we will deem that every motion or any objection made by any counsel for any of the three defendants will inure to the benefit of all." (Tr. 952).

that he knew it had been stolen, just as here there was no corroboration of Sampson's "confessed" knowledge of the robbery plan.

Here, the only independent evidence was that Sampson was with Harrison on March 7 when Harrison borrowed a Buick car from one Evans (Tr. 220); that Sampson was in a booth at the same restaurant as the decedent the morning of the accidental death (Tr. 630), left the restaurant behind the decedent (Tr. 630), and went to a Buick car parked nearby, where he "stood there at the car for a moment or so, and then he got in the car." (Tr. 631). The only other independent testimony was that two unidentified individuals fled from the home of the decedent after a shot was heard, but it is not suggested nor was it ever claimed by the prosecution that Sampson was one of these (Tr. 144). White testified merely that Sampson drove him and Harrison to 4th and R Street, that Harrison left the car and when White was looking for him he heard the explosion and Harrison ran past him (Tr. 970 et seq.). Harrison's testimony, to repeat, was that he went to see Brown to pawn the gun (Tr. 1139).

This testimony in no way corroborates the alleged robbery attempt. Under the principle of the Forte decision, we submit there was insufficient corroboration of the robbery

intent to warrant submitting the case to the jury, even assuming the confessions were admissible despite the patent violations of Mallory.[4]

IV.

THE CONFESSION OF APPELLANT WAS INADMISSIBLE BECAUSE OF VIOLATION OF RULE 5(a) OF THE RULES OF CRIMINAL PROCEDURE.

Under Mallory v. United States, 354 U. S. 449 and McNabb v. United States, 318 U. S. 382, a confession elicited during a period of illegal and prolonged detention contrary to Rule 5(a) of the Federal Rules of Criminal Procedure is inadmissible in evidence over the objection of the defendant.

Here the following factual situation was revealed by the Government's own witnesses:

Sampson was first arrested on March 8, held over night and released on March 9 (Tr. 1044, 1045) "because at that time we didn't have sufficient evidence to proceed any further." (Daly, Tr. 1055, 1056). He was arrested again on March 20. Police Officer Daly testified he "was in the homicide squad office between 5 and 6 P.M. on March 20 and received a telephone call. A voice said to me 'This is Sampson. I understand that you have been to my house looking for me. If you

4. The Forte case was only recently cited with approval in Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 441, 456.

want to see me, I am at home.'" (Tr. 256) Two officers, Pixton and Mode, were sent to bring Sampson in (Tr. 256), Pixton testifying that he considered that in doing so he was "arresting" Sampson (Tr. 852).[5] At 6:30 P. M. Captain Hartnett who was on duty at the time made an entry on the arrest book charging Sampson with homicide (Tr. 1025).

Captain Daly testified that Sampson was brought in "as a witness" rather than "as a defendant" (Tr. 256) and this was the theory of Government counsel (Tr. 257, 1021). However, Captain Hartnett conceded that witnesses are not "arrested," only defendants.[6] (Tr. 1026) In any case, as already noted, Captain Hartnett charged Sampson in the arrest book at no later than 6:30 P.M. (Tr. 1025), so it is unnecessary to consider whether the detentions were proper under Judge Prettyman's opinion in Trilling v. United States, 104 U. S. App. D. C. 159, 200 F. 2d 677, 697.

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5. Q. Detective Pixton, when you brought Joseph Sampson in, you arrested him, did you not, or assisted in the arrest of Joseph Sampson on March 20th?
A. I did. (Tr. 852)

6. Q. . . . Does that book indicate anywhere that he was arrested as a witness?
A. No, sir, it wouldn't indicate it.
Q. What does it indicate?
A. If he was a witness he wouldn't have been arrested. (Tr. 1026)

Shortly after he was brought in, Sampson made an exculpatory oral statement which took about 10 or 15 minutes (Tr. 263). Daly stated that he typed up this statement which because of interruptions, was not completed until about 9 p.m. (Tr. 267). Between 9:00 and 9:30 p.m. Daly testified he confronted Sampson with White, and that between 10:20 to 10:30 p.m. Sampson began a second incriminating oral statement (Tr. 274) which took about 5 or 10 minutes (Tr. 275). The statement was typed between 10:45 and 11:50 p.m. (Tr. 275).

Daly further testified that it was only after the second incriminatory statement was obtained that Sampson was taken to the Identification Bureau. Detective Pixton said he took him to the Identification Bureau "after midnight". (Tr. 1114). The records of the Bureau showed that his identification sheet was stamped March 21, 1960, with a pencil notation of 1:30 a.m. (Tr. 1231, 1232 Sampson Exhibit No. 7). The prosecution admitted that Sampson was not arraigned until 10 a.m. March 21, 1960 (Tr. 1036).

Despite these undisputed facts, the trial court refused to exclude the confessions on the ground that, under its version of the law, "there is no requirement that a committing magistrate be available at all hours. Consequently, there

was no requirement that any preliminary hearing be held before nine or ten o'clock the following morning." (Tr. 405)

Appellant produced a list of Assignment of the Judges for Arraignments, 1960 (Tr. 1010) which the Court admitted as Sampson's Exhibit No. 5 showing that a magistrate was available at all times (Tr. 1048). However, the Court adhered to its ruling "that there is no compulsion or that it is not mandatory to hold a preliminary hearing outside of office hours. It is sometimes done, but it is not mandatory." (Tr. 1032).

This ruling is directly contrary to the decisions of this court in Coleman v. United States, ____U.S. App. D.C. ____, 313 F.2d 576; Tatum v. United States, ____U.S. App. D.C. ____, 313 F.2d 579; and especially Mitchell v. United States, ____, U.S. App. D. C. ___, 316 F.2d 354 at 356.

Hence, at the very least, the conviction must be set aside and the case remanded for a new trial because of the patently erroneous admission of the confession into evidence. 7/

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7. The hours of detention here are strikingly similar to Coleman v. United States, supra., and the delay even greater. Here Sampson was arrested between 5:30 and 6:00 p.m., was charged with homicide in the arrest book at 6:30 p.m. and his "confession" obtained between 10:20 and 10:30 (Tr. 274). In Coleman, the arrest was at 6:45 p.m. and the confession at 8:50. In both there was no arraignment until the next morning. The statement made after arraignment to the classification officer at the city jail on March 22, 1960 (Tr. 873) was of course equally inadmissible under the decision in Killough v. United States, ___ U.S. App. D. C. ____, 315 F.2d 241.

V.

THE COURT'S INSISTENCE ON HAVING SAMPSON HANDCUFFED BEFORE THE JURY LEAVING THE MATTER TO THE DISCRETION OF THE MARSHAL WITHOUT EVEN A SUMMARY HEARING ON THE ALTERCATION WITH THE DEPUTY MARSHALS WAS AN ABUSE OF DISCRETION.

"[T]he right of the accused to appear before the jury without manacles has always been acknowledged and ought not to be denied except where the character of the accused and the danger of escape or disorder make a different course necessary." Blaine v. United States, 78 U. S. App. D. C. 64, 136 F.2d 284 at 285.[8]

Of course, "it lies within the discretion of the trial court to have the prisoner shackled when it is manifest that such a precaution is necessary to prevent violence or escape, and an appellate court will not revise the trial court's action except in a clear case of abuse of discretion." 14 Am. Jur., Criminal Law, §132.

We submit that here there was a clear case of abuse of discretion, in the trial court's holding (1) that the matter was "entirely at the discretion of the Marshal", (2) in refusing

8. In accord: Way v. United States, 285 F. 2d 253, 254; State v. Coursolle, 255 Minn. 384, 97 NW. 2d 472; Annotation 75 ALR 762; 14 Am. Jur. Criminal Law, §132.

even a summary hearing on whether there was actual justification for placing appellants in manacles, and (3) at the very least, giving an appropriate instruction to the jury.

The trial started on April 22, 1963. On April 24, 1963, the 3rd day of the trial, Sampson and White were brought into the courtroom in irons. Mr. Stempil on behalf of both Sampson and White objected to their being in "leg chains and irons", as follows (366, et seq.)

> "Mr. Stempil: Number two, the defendants have advised me that the leg chains are tight, and they would like to ask the court to allow them to sit in court without the leg chains and they will behave themselves."
>
> "The Court: <u>That is entirely at the discretion of the Marshal.</u> The Marshal is responsible for good order. The mere fact that people who have been convicted of murder and by a jury promise to behave themselves is not a very reliable promise."
>
> "Mr. Stempil: For the record, Your Honor, the Government has said they have never been convicted."
>
> "The Court: Oh, no, one jury has found them guilty * * * They are being tried a second time merely because more or less of a technicality. In any event, I am not going to accept their promise that they are going to behave themselves. <u>That is entirely up to the Marshal</u> . . . ."
>
> "Mr. Stempil: I renew the motion."
>
> "The Court: I beg your pardon."
>
> "Mr. Stempil: That I think they won't be getting a fair trial."

> "The Court: They brought this on themselves, Mr. Stempil. In all my years on the bench, I do not recall hearing of such an episode of two prisoners in a capital case or any other kind of case attacking Deputy Marshals in the cell block during a short recess of the Court."
>
> "Mr. Stempil: Evidently Your Honor didn't hear the entire story." (emphasis supplied)

Mr. Stempil was not permitted, however, to give the entire story; instead the Court digressed to discuss the superiority of the English system of having the prisoner sit in a dock.[9]

The next day, April 25, 1963, when a newspaper article appeared entitled "Two Defendants Fight Deputy Marshals," and which stated that "for the balance of the trial Sampson and White were going to be in shackles and chains," Sampson's counsel asked for a mistrial. In denying a mistrial the Court said (Tr. 523)

> "Court: * * These defendants created this trouble. Two of the defendants attacked Deputy Marshals in the cell block . . . Now, you are asking me . . . to order a mistrial on behalf of the defendants for something that the defendants did . . ."
>
> "Mr. Stempil: But, Your Honor, you have stated today and you did state yesterday that they started the situation. You haven't heard the entire case, and I would like to tell the Court that this was done as a result of, I think, an inexperienced Marshal pushing Sampson when he attempted to talk to me on the way back to the jail, and used special extra force in putting him back there, and I think --"
>
> "The Court: You know, I think the defendants were were fortunate . . ." (emphasis supplied)

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9. Tr. 368, 369

When counsel then requested a summary hearing so the Court could ascertain the true facts, he was rebuked as being "absurd". [Tr. 527]

> "Mr. Stempil: For the benefit of the defendants, then may I ask the Court to suspend this trial and try these men on this particular matter so we can get this straightened out?"
>
> "The Court: Don't be absurd, and I say this deliberately . . ."

That same afternoon, Sampson's counsel advised the Court of another article, this time in the Washington Post, and asked that the Court inquire of the jury if they would be prejudiced because defendants were handcuffed. The Court refused, offering instead "to ask the jury whether the jury would be prejudiced against any of the defendants by reason of the fact that they attacked the Deputy Marshal yesterday afternoon." (Tr. 573) Counsel thereupon objected "You couldn't ask them that because that isn't a correct statement of fact." (ibid) The Court then rebuked counsel because he stated that appellants were still in leg irons when the leg irons (unknown to counsel) had been removed but appellants remained in handcuffs and waist chains.[10/] However, if restraints

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10. Tr. 573, 574 "The Court . . .
. . . . Do they have leg irons, Marshal?
The Deputy Marshal: No, sir.
The Court: They haven't leg irons. They have handcuffs and belts. (cont.)

were not justified, it was prejudicial to keep appellants in handcuffs and waist chains regardless of whether the leg irons were removed, and the rebuke to counsel quite unmerited.

At the conclusion of the Government's case, Mr. Stempil renewed his motion for a new trial because the defendant was "shackled and chained". (Tr. 953) [11] The Court, after quibbling over the definition of the word "shackled", [12] denied the motion

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10. (cont.) "Mr. Stempil: They took them off.
The Court: Why do you misstate things?
Mr. Stempil: They had them on yesterday.
The Court: You see, you are stating things that go on the record and they aren't true. Everything that is said by everyone goes on the record and you know we expect professional members of the bar to be very meticulous as to the accuracy of their statements."

11. "Mr. Stempil . . . I know until the end of the trial, he will be shackled and chained.
The Court: Not shackled. Nobody is shackled.
Mr. Stempil: Handcuffed
The Court: And nobody is chained
Mr. Stempil: Handcuffed
The Court: There is a big difference between handcuffed and shackled or chained.
Mr. Stempil: Has restraining irons.
The Court: Counsel, as officers of the Court, are charged with the duty of being accurate. He is not shackled."

12. Mr. Stempil's use of the word shackle as synonymous with handcuff is approved by Webster's Collegiate Dictionary (5th Ed.) p. 912, "Shackle: 1. Something that confines the legs or arms; a manacle; fetter . . ." In turn, "manacle" is defined (p. 607) "A handcuff; hence, a fetter; restraint . . ." It is also clear from the Marshal himself that contrary to the court's statement that "nobody is chained", White and Sampson wore "waist chains and handcuffs." (Tr. 725)

on the ground (never proven) that appellants had attacked the deputy marshal for which reason "the Court authorized the marshals to use their discretion." (Tr. 954) Counsel's request for leave to make an offer of proof with reference to the motion was then peremptorily denied (Tr. 955).

The Court was clearly wrong in leaving the matter to the unreviewed discretion of the marshals. It should either (1) have ordered the manacles removed; (2) given appellant a summary hearing on whether in fact there had been the aggression and, if so, whether they had been provoked, so as to decide whether restraints were really necessary; or (3) at the very least instructed the jury that the fact of manacling was no evidence of guilt.

In comparable situations, courts have been careful explicitly to warn juries against making any inferences of guilt from defendants' being manacled.[13] Here, the Court refused

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13. See, for example, Rich v. United States, 261 F.2d, 536 (CA 4 Va.), cert. den. 359 U.S. 946, where the trial court gave the following instructions (264 F.2d 536, at 538): "You may have noticed in the course of the trial that the defendant and I believe one of the witnesses was handcuffed or manacled, shackled, as you wish to call it. Now that is not to prejudice you against either the accused or the witness. It is merely the carrying out by the Marshal of the control and responsibility imposed upon him by law of the defendant and of the witness because they are already in custody on another charge. They are not handcuffed because of this charge. It is not to be inferred that the Marshal or the Court or the Government thinks they are guilty of this charge and, therefore, they are manacled. It is simply a regulation that is being effectuated by the Marshal."

to do anything of the sort, offering, almost with irony, to "ask the jury whether the jury would be prejudiced against any of the defendants by reason of the fact that they attacked the Deputy Marshal yesterday afternoon." (Tr. 573) It is hard to imagine a more prejudicial question, especially since the Court's assumption that the defendants were at fault was obviously pure hearsay, repeatedly denied by Sampson's counsel, and as to which appellants were denied any hearing whatsoever.

VI.

THE TRIAL COURT'S CONDUCT TOWARDS SAMPSON'S COUNSEL WAS SUCH AS BY ITSELF TO REQUIRE A NEW TRIAL.

It is well settled that a conviction will be reversed where the record shows "remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury. Especially is this so where many of counsel's objections must be repeated in order properly to protect his client because he believes in good faith that the judge has ruled erroneously." United States v. Ah Kee Eng., 241 F.2d 157 (CA, 2d); Billeci v. United States, 87 U. S. App. D. C. 274, 184 F.2d. 394; Peckham v. United States, 93 U. S. App. D. C. 144, 210 F.2d. 693.

In the Peckham case, the conviction was reversed because the "comments to defense counsel, indicating hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury." The same can be said of the attitude of the court in this case, except that there was no element of provocation to condone the conduct of the Court.

We list below the most glaring instances of hostility and also of the double standard applied so as to hamstring defense counsel while leaving the prosecution quite unrestricted:

1. By Mr. Stempil:

Q. Mr. Aufrecht, are you in charge of seeing that when a body is brought in, that it is undressed and made ready for the Coroner?

THE COURT: I am going to exclude that. That has nothing to do with the case.

Q. Mr.Stempil: Your honor, may we approach the bench?

THE COURT: All he testified to was that the body was identified to him by the nephew and niece of the deceased, that he, in turn, identified it to the Coroner.

Q. Mr. Stempil: May we approach the bench for a moment?

THE COURT: No, No. If you want to make him your own witness on some other point you may recall him

at the proper time. Let's move along, gentlemen. It is not customary to waste so much time on identifying the body at the morgue. I notice the other two counsel are acquiescing properly. (Tr.120)

2. Mr. Stempil: I would like to note my objection to the Court's statement.

THE COURT: Well, you can keep on objecting.

I think there is an awful lot of time being wasted here. I want to make it clear that my remark does not apply to all of the defense counsel. (Tr. 197).

3. THE COURT: It does not make any difference. You are wasting an awful lot of time, Mr. Stempil, because this witness has not identified anyone.

Defense Counsel, and I don't include all of them, have been really imposing on the Court's patience today and wasting a lot of time on irrelevant matters. We haven't yet had any testimony connecting any of these defendants with the offense with which they are charged.

Mr. Stempil: I would like to nail that down and make sure.

THE COURT: I am telling you that we haven't had any evidence yet connecting any one of the three defendants with the offense with which they are charged. You don't have to make it any surer than getting the statement from the Court. (Tr. 200).

4. THE COURT: There is nothing here which indicates that he forcibly took Sampson or anyone else by the arm. I consider that an unfair insinuation. He says he took Sampson by the arm and said, "Come here a minute." Does that mean forcefully?

You know, I think counsel must not insinuate matters of that kind and certainly not in accordance with the highest standard of ethics of the profession. (Tr. 536)

5. THE COURT: Well, I am going to exclude the question as not proper cross-examination.

Mr. Stempil, you have got to move along. You have been just consuming time and most of your questions are outside of the scope of the direct examination and have nothing to do with the issues of this case. (Tr. 571).

6. Mr. Stempil: May the Court direct him to answer the question?

THE COURT: You are not a schoolmaster talking to pupils, you know. (Tr. 575).

7. THE COURT: I am going to exclude that as immaterial, Mr. Stempil. That is absolutely immaterial.

Mr. Stempil: Your Honor, I am going to object respectfully to the Court's exclusion because there was brought in by the Government, by the prosecution, at the beginning of the trial evidence that two people went to the morgue and identified a body as that of George Brown; and they swore under oath that he was a George Brown living at 1713 4th Street, Northwest. Here is a statement that said a man, George Brown, lived at 518 Jefferson Street.

THE COURT: That is immaterial. Now please don't trifle with the Court. We are dealing with the most important type of a case. This is a homocide case and these defendants are charged with a very serious crime. Don't descend into trivialities, because that isn't going to help your client, Mr. Stempil. I made an observation to you before we brought in the jury this morning which I thought was in the interest of your client; and I thought at the time that I made it you realized its importance; but you seem to have forgotten it.

Mr. Stempil: No, Your Honor, I wouldn't forget it.

THE COURT: I know but you have paid no attention to it anyway even if you remember it.

Mr. Stempil: I will pay attention to it, Your Honor, when I think it is important to the protection of my client.

THE COURT: I told you how to protect your client's rights. (Tr. 587-588).

8. Mr. Stempil: Instead of allowing the witness to refresh his memory from notes, Mr. Smithson stopped him and handed him an exhibit.

THE COURT: I understand. He said in order to make things simpler, but that does not mean he wasn't permitted to refer to his notes.

I think counsel should not distort facts like that. I am sure that you do not do it on purpose, Mr. Stempil, but trial counsel must have an accurate memory, should have an accurate memory. (Tr. 614).

9. THE COURT: I am going to exlude that because that is immaterial. It is outside of the scope of the direct examination and it has no bearing on credibility.

Mr. Stempil: But he brought the matter up, Your Honor, when I cross-examined him.

THE COURT: That does not make any difference.

By Mr. Stempil:

Q. Mr. Young, after you--

THE COURT: You know, the Court expects all members of the Bar both to know the basic rules of evidence and also, knowing them, to conform to them. (Tr. 657).

10. THE COURT: I do not care whether there is or not. The Court finds from the undisputed testimony that all three defendants were arrested on the afternoon

of March 9th, and then released presumably because there was not sufficient evidence to hold them, or to charge them. They were all brought back, they were all rearrested on the 20th of March.

These facts are established, and do not waste time. You have been wasting time, you know, and the time has some value, Mr. Stempil. This witness has been on the stand for half an hour and you have not elicited anything that is relevant to the issues.

Mr. Stempil: I object, Your Honor.

THE COURT: You have to move more expeditiously. (Tr. 1045).

11. THE COURT: Now let us move aloog (sic), gentlemen. Do you know what you are trying to prove by this witness that is on the witness stand.

Mr. Stempil: Yes.

THE COURT: Very well, then suppose you get right to what you want to prove by the witness. I was not sure whether you did or not. (Tr. 1091).

12. THE COURT: Defense counsel, all counsel must comport themselves with proper decorum that befits a courtroom.

Mr. Thomas: I object to that remark.

THE COURT: The same decorum is required in a courtroom that would be required in a church while services are going on. (Tr. 1361).

13. By Mr. Smithson:

Q. Is it not a fact that you didn't believe that he had shot him and told him that he was spoofing and he repeated it several times to you?

Mr. Thomas: I object to what this defendant believed.

THE COURT: Objection overruled. This is proper cross-examination and you know that it is. Please don't make objections that are obviously unfounded. (Tr. 1386-87).

In addition, the following illustrate a double standard for conduct permitted the prosecution but prohibited to Mr. Stempil:

14. When Mr. Stempil was cross-examining a government witness, the following occurred:

"Q Then you were the arresting officer?

"A Yes, sir.

"THE COURT: Please don't put words in the witness' mouth and don't make statements. I am going to strike your remark." (Tr. 1149).

However, when the prosecutor was cross-examining a defense witness, the following occurred:

"Q In fact, they never told you he was under arrest then, did they? They didn't tell you he was under arrest then, did they?

"MR. STEMPIL: I object, Your Honor.

"THE COURT: Objection overruled." (Tr. 1200).

15. When Mr. Stempil was questioning a government witness, the following occurred:

"MR. STEMPIL: Here we go.

"MR. SMITHSON: Your Honor, may that remark of counsel be stricken from the record?

"THE COURT: I am going to ask counsel to come to the bench.

[1/]

"(AT THE BENCH:)

"THE COURT: Mr. Stempil, you know that is a discourteous remark, here we go. What did you mean by that?

"MR. STEMPIL: This was the beginning of a here we go and I was going to ask him --

"THE COURT: What did you mean by the remark here we go?

"MR. STEMPIL: I was starting my examination of him.

"THE COURT: But what did you mean by the remark here we go?

"MR. STEMPIL: Nothing, except I was ready to start into my examination.

"THE COURT: It certainly had a very disagreeable connotation. You know - -

"MR. STEMPIL: I meant nothing by it.

"THE COURT: You don't like to have me and, naturally, you would not want me to get harsh, but I am going to be harsh if you are going to keep on insulting witnesses.

"MR. STEMPIL: I haven't --

1/ It should not be assumed that the bench conferences were beyond the hearing of the jury; it was reported at one point that they could be heard in the back of the courtroom. (Tr. 436)

"THE COURT: And besides which, you know, when you get disagreeable to witnesses, I have told you before, you are hurting your own client.

"You may go back to the counsel table, gentlemen.

"Don't do that again. Make no statements except asking questions.

"MR. STEMPIL: I'm sorry.

"(IN OPEN COURT:)

"THE COURT: The motion is granted, Mr. Smithson, and I will strike that side remark of counsel.

"MR. SMITHSON: Thank you, Your Honor.

"THE COURT: Counsel must not make side remarks, they must confine themselves to asking questions; and especially side remarks that are subject to disagreeable connotation or interpretation." (Tr. 1125-1126).

However, when the prosecutor was questioning a defendant, the following occurred:

"Q All right. Where was it Daly supposedly hit you?

"A Headquarters.

"Q Uh-huh. And where was it Schwab supposedly hit you?

"A 57 Bryant Street and also at Headquarters.

"MR. STEMPIL: Your Honor, each time the defendant makes an answer Mr. Smithson says --

"THE COURT: Just a moment. This is proper cross-examination. You may not make any statements during cross-examination.

"MR. STEMPIL: I am going to object to --

"THE COURT: On what ground?

"MR. STEMPIL: The prosecutor, each time the defendant makes an answer, he says --

"THE COURT: Just a moment. State your objection in legalistic phraseology. What is the objection?

"MR. STEMPIL: The prosecutor, after each time the defendant makes an answer, the prosecutor says uh-huh. I would ask him not to say it.

"THE COURT: Don't be ridiculous. Sit down, please." (Tr. 1259-1260).

* * *

"Q Now, sir, since you didn't work on that 9th or 10th, 11th or 12th, did you make any reports, sir, to the Metropolitan Police Department, the Chief of Police, the Chief of Detectives, or the Federal Bureau of Investigation, that anyone allegedly mistreated you?

"A When was this?

"Q After you supposedly were whipped, sir.

"A No, I didn't.

"Q Uh-huh.

"MR. STEMPIL: Your Honor, I am going to object to the manner in which Mr. Smithson finishes those questions.

"THE COURT: Objection overruled. This is proper cross-examination.

"MR. STEMPIL: Not with the uh-huh at the end of every question, Your Honor.

"THE COURT: This is proper cross-examination.

"MR. STEMPIL: May he be advised --

"THE COURT: Just a moment. The Court has ruled. Counsel may not continue speaking after the Court has ruled." (Tr. 1273-1274).

16. The Court intervened in Mr. Stempil's efforts to establish contradictions in government witness' testimony, and he warned defense counsel:

"I think counsel should not distor- facts like that. I am sure you do not do it on purpose, Mr. Stempil, but trial counsel must have an accurate memory, should have an accurate memory." (Tr. 614).

* * *

"I again insist that you must not paraphrase testimony inaccurately. This is a very serious matter." (Tr. 618)

However, a different standard was applied when the prosecutor cross-examined defense witnesses:

"Q Then your testimony of yesterday when you identified Officers Daly, Schwab, Kelly and Pixton as striking you on March the 8th of 1960, is incorrect, is that --

"MR. STEMPIL: I object, Your Honor. He never testified in that fashion yesterday.

"THE COURT: I think the jury will have to decide whether he did or did not testify to that. I don't think I am called upon to decide that." (Tr. 1261).

* * *

"Q Now, on March the 8th you have told us you were taken to No. 2 Precinct. Were you beaten at No. 2 Precinct on March the 8th?

"MR. STEMPIL: I object, Your Honor. He didn't testify to that.

"THE COURT. Well, that is proper cross-examination.

"MR. STEMPIL: He testified he got there on the 9th.

"THE COURT: Objection overruled." (Tr. 1263-1264).

* * *

"Q And it had been bouncing around in the back end of your car that particular day, too, is that correct?

"MR. THOMAS: I object to the word bouncing.

"THE COURT: Objection overruled.

"BY MR. SMITHSON:

"Q Is that correct?

"MR. THOMAS: May it please Your Honor, it assumes a fact not in evidence.

"THE COURT: Just a moment. Counsel may say nothing except note an objection in legalistic phraseology, and I will rule on the objection, but you cannot get up and interrupt. I have said that so often, and you must not transgress again." (Tr. 1357).

* * *

"Q And when you got to the door, sir, you were asked for this shotgun by Brown, to let him see it, is that correct?

"A That's right.

"Q Then, sir, would you mind telling the ladies and the gentlemen of the jury why you raised it to the level of almost six feet to show it? [1/]

"MR. THOMAS: I object.

"THE COURT: Objection overruled. And please wait until the question is finished, or I just will not entertain your objections, and I will use stronger discipline if you get out of line again.

"MR. THOMAS: I object to that statement.

"THE COURT: Overruled.

"MR. THOMAS: All I did was object. I object to your statement.

"THE COURT: You may resume your seat, sir.

"MR. SMITHSON: May I ask the reporter to read the question, Your Honor?

1/ The coroner had been unable to say what position the gun was in, or whether it had been raised as described by the prosecutor. (Tr. 131-132).

"THE COURT: Yes, indeed.

"(Question read by the reporter: 'Then, sir, would you mind telling the ladies and the gentlemen of the jury, why you raised it to the level of almost six feet to show it?')

"THE COURT:This is a perfectly proper question on cross-examination.

"BY MR. SMITHSON:

"Q Now will you answer the question, sir?

"A Yes, sir. When I was going to the door and he was slamming the door in my face, I tried not to let the gun hit the window, to keep it from breaking it, but it did.

"Q So, sir, the gun was at your side and he asked to see it, and you raised it up and pointed at a six foot level, sir, is that your testimony?

"A No, sir." (Tr. 1358-1360).

17. The following illustrate the double standard applied to Mr. Stempil and the prosecution concerning unresponsive answers.

"MR. STEMPIL: May the Court direct him to answer the question?

"THE COURT: You are not a schoolmaster talking to pupils, you know.

"You answer in your own way, Captain." (Tr. 575).

* * *

"MR. STEMPIL: I am going to object, Your Honor, before the witness answers, that he is not answering.

"THE COURT: Just a moment. All witnesses may answer in their own way. You may proceed.

"Please do not make your objections so vehemently, Mr. Stempil. That is not proper decorum." (Tr. 1059-1060).

* * *

"Q [By Mr. Stempil] Was there anything that you took off of this body?

"A I can't say that there was anything that I took off the body, no, sir. I don't think so. At that time I picked up some shot off the floor.

"THE COURT: That was not the question, Sergeant.

"MR. STEMPIL: May I ask that the answer be excluded, be stricken? May that part of the answer be excluded?

"MR. SMITHSON: I believe that the answer is proper because the question was too general.

"THE COURT: I don't understand, Mr. Stempil, what are you asking the Court to do?

"MR. STEMPIL: He made a later answer which was not responsive to the question.

"THE COURT: It does not make any difference. I am not going to strike it." (Tr. 1084).

* * *

"Q [By Mr. Smithson] I see. Now when you came in on the 20th of March, did you tell Officer Mode or Officer Pixton that you had been beaten when you were down there before?

"A Why should I tell them I had been beaten? Was they going to stop them from whipping me?

"MR. SMITHSON: Your Honor, might the witness be instructed to answer the question?

"MR. STEMPIL: He can answer it any way he wants to.

"THE COURT: Read the answer, please.

"(The last answer was read by the reporter.)

"THE COURT: Motion granted. Let the answer be stricken.

"BY MR. SMITHSON:

"Q Now, did you tell them, sir?

"A Why should I tell them. Was they going to stop them from whipping me?

"THE COURT: No, just a moment. Wait until the question is finished.

"BY MR. SMITHSON:

"Q Did you tell Pixton or Mode that you had been whipped before?

"MR. STEMPIL: I object, Your Honor.

"THE COURT: Objection overruled.

"THE WITNESS: Was that going to stop the rest from whipping me?

"BY MR. SMITHSON:

"Q You won't answer the question, Mr. Sampson?

"A I answered the question.

"THE COURT: No, you didn't. Let the reporter read the question. Now you listen carefully to the question and answer it directly." (Tr. 1276-1277).

* * *

"Q [By Mr. Stempil] Under what conditions did you see your son?

"A [By defense witness] His lips were swollen, he had a cut over his eye, and I asked him what was wrong.

"THE COURT: No, no, do not tell us what was said. Suppose you make your question a little more specific." (Tr. 1183).

18. The double standard also extended to the latitude permitted in admonishing witnesses:

"Q [By Mr. Stempil] This is a simple question. Did anybody --

"THE COURT: No, don't make remarks of that kind.

"MR. STEMPIL: I want to rephrase it, Your Honor.

"BY MR. STEMPIL:

"Q I am not referring to the previous question --

"THE COURT: Please don't make remarks of that kind to the witness. You may confine yourself to asking questions." (Tr. 580).

* * *

"Q [By Mr. Stempil] Just answer the question.

"THE COURT: No, just a moment. Don't talk that way to the witness.

"You answer in your own way." (Tr. 1497).

* * *

"Q [By Mr. Stempil] Did you use any pressure when you put your hand on him and said, 'Come in here'?

"A No, sir. What you mean by pressure I don't quite understand.

"Q Did you divert his direction in which he was going when you said, 'Come in here'?

"A Yes, sir.

"Q Then you had to use some pressure, didn't you?

"MR. SMITHSON: That is argumentative, Your Honor.

"THE COURT: Please do not argue with him.

"MR. STEMPIL: This is cross examination.

"THE COURT: Do not make any statement. Just ask questions but do not be argumentative." (Tr. 624).

However, the prosecutor was allowed to argue freely with the witnesses:

> "Q [By Mr. Smithson] You did not go there?
>
> "A I didn't go on my own.
>
> "Q Sir, did you go -- I didn't ask for the self-serving statements, just listen to the question -- Did you go to Homicide or not?" (Tr. 1275).

* * *

> "Q [By Mr. Smithson] That is your son, is it not, Mrs. Sampson?
>
> "A I guess it is.
>
> "Q Well, ma'am, now we are not concerned with guesses; is it your son?
>
> "THE COURT: You may answer the question, please.
>
> "THE WITNESS: I presume it is." (Tr. 1191).

* * *

> "Q [By Mr. Smithson] I see. Now, where is it that you were taken?
>
> "A I just told you.
>
> "Q All right. Now, at the time you were taken into some room within Homicide, who was it struck you there?
>
> "A Quite a few officers.
>
> "Q Let's don't give me quite a few. Identify them by names, if you can.

"A Well, --

"MR. STEMPIL: I object, Your Honor. He is arguing with the witness.

"THE COURT: Objection overruled." (Tr. 1265).

* * *

"Q [By Mr. Smithson] I am not concerned with probably and neither is the jury, Mr. Sampson. Did you or did you not see him?

"A I was --

"MR. STEMPIL: I object, Your Honor.

"THE COURT: Objection overruled." (Tr. 1280).

* * *

"Q [By Mr. Smithson] In fact, Detective Kelly testified, sir, - strike that, if I may.

"I will put it to you, sir, on the morning of March the 21st, 1960, that your statement was taken down on the typewriter by Detective Kelly, isn't that correct?

"MR. THOMAS: I object.

"THE COURT: I think this is permissible. Objection overruled." (Tr. 1349).

* * *

"Q [By Mr. Smithson] Is it not a fact, sir, that he did not use the word accidentally, and told you that he had shot the fat boy at the door, that he and another man went to the door?

"MR. THOMAS: I object.

"THE WITNESS: No, he didn't tell me that.

"BY MR. SMITHSON:

"Q He didn't tell you that?

"A No, he didn't." (Tr. 1385).

* * *

"Q [By Mr. Smithson] And your photograph is dated March the 21st and was taken on March the 21st; correct?

"A Yes, it was.

"Q Then, sir, when you testified earlier that your photograph was taken on the 22nd, you were in error, is that correct?

"MR. STEMPIL: I object, Your Honor. He never testified to that.

"THE COURT: Well, the jury --

"MR. STEMPIL: The photograph speaks for itself.

"THE COURT: The jury's recollection will have to govern. But I must insist that you must not get excited and make your objections so vehemently because otherwise I will just excuse you from the courtroom.

"I think members of the Bar are expected to comport themselves with the manners of gentlemen." (Tr. 1283).

The foregoing examples of discrimination against Mr. Stempil, as well as remarks belittling his ability and ethics, require a new trial quite aside from the even more basic errors discussed in previous portions of the brief.

For, the belittling of counsel was merely one example of the Court's bias against the defendants. The handling of the handcuff-waist chain issue (See Point V above) showed similar bias. And,even after the jury retired and returned to the court to have part of the evidence read to it, the Court again seemed to have ignored the rights of defendants.

A written note had been sent to the Court asking for the transcript of the testimony of certain police officers and "all of the defendants." (Tr. 1698) The Court had the clerk read the testimony of the policemen, but ignored having the clerk read the testimony of the defendants. (Tr. 1699-1702).

This, we submit, was still one more evidence of bias which, even taken alone, would require a new trial. For when the testimony of the police version of events in the jail was read again to the jury, elementary fair play required that the contrary version of the events by the defendants should also be read again, especially since the written note had explicitly asked for the statements of "all the defendants" (Tr. 1698).

Under essentially similar circumstances, failure to read portions of the transcript to the jury was held reversible error. United States v. Jackson (CA 3rd) 257 F.2d. 41, 43.

CONCLUSION

In view of the foregoing, it is prayed that the Court reverse the conviction entered in the Court below and remand with instructions to enter a judgment of acquittal, and for such other relief as the Court deems just and proper.

Respectfully submitted

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(By appointment of this Court)

CERTIFICATE OF SERVICE

I certify that on this 24th day of October, 1963, I mailed, postage prepaid, a copy of the foregoing to the United States Attorney, David C. Acheson, in the United States Court House, Washington 1, D. C.

Monroe Oppenheimer

APPENDIX

Constitutional Provisions, Statutes and Rules Involved

United States Constitution
Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Amendment VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Criminal Procedure state:

Rule 5(a). Appearance Before the Commissioner.
An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

District of Columbia Code states:

§ 4-140. Arrests without warrant.

. . . such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

§ 22-2401. Murder in the first degree - Purposeful killing- Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-4 2, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

District of Columbia Code states:

§ 22-2901 Robbery

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

§ 22-2902. Attempt to commit robbery.

Whoever attempts to commit robbery, as defined in section 22-2901, by an overt act, shall be imprisoned for not more than three years or be .. fined not more than five hundred dollars, or both.